

# **Terrorism, Security and Rights: The Influence of Balance 2001-2006**

## **Abstract:**

9/11 consequently demonstrated a vulnerability to terrorism, both national and personal. The 'need to protect', was evidenced by the swift enactment of the ATCSA 2001. Risk and threat rhetoric was underpinned by a sense that everything could change imminently. This 'need to protect' escalated the perception that a 'balance' between security and rights was operational.

This thesis focuses on three pieces of UK anti-terror legislation throughout the period of 2001-2006. It argues that while the term 'balance' is often used to describe how legislation is legitimised in favour of rights or security, the process of 'balance' is less explicit through political debate than may be expected.

This thesis uses a mixed method approach consisting of both qualitative and quantitative methods. This was informed by the parliamentary debate located in Hansard. Whereas the quantitative data collected presented a broad overview of debate from the House of Commons during 2001-2006 specific to rights and security, the qualitative assessment reduced the breadth of review and focused on one case study from each of the acts examined. This examination highlighted various influences between conceptual interpretations and the allocation of roles with the constitutional framework in the UK. Seven key observations emerged through which this research established that there are too many influences on parliamentary debate to be able to ascertain precise data of how parliament actively creates legislation. This is further complicated by the existence of a number of shortfalls in the validation process of legislation within the UK parliamentary system. These findings pave the way for a review of human rights law incorporation within the UKs constitutional framework.

## **Acknowledgements**

A long and difficult journey, this thesis would never have been completed if not for my supervisor Kate Williams, whose selfless time and care were sometimes all that kept me going. Her nurturing of me but most of all her understanding of my difficulties have steered me through the last six years to finally reach this point for which I am eternally grateful. I would like to thank Ann Sherlock whose clinical carving of my early research identified areas of weakness allowed me to strengthen this submission. I would also like to thank Chris Harding, in his support at the later stages of my thesis.

I would like to thank the student accessibility team at Aberystwyth University for supporting me with my difficulties, working alongside me to help get me the support I needed and most importantly committing their time to help me through. Extra thanks goes to the student support team who have accepted that I have no filter, cannot concentrate for extended periods of time, and watched me cause chaos with mind maps around the office white board space.

I have a number of friends and family who although have continued to mock the length of time taken to complete this research, have nonetheless been there to support me. I would like to thank Safety and his beautiful family who I love and cherish, Sophie Coughbrough who became my rock in difficult circumstances, Emily Oliver who has stood by me even when I became miserable and frustrated with my research and who gave me a mile when I could only give an inch – I owe you more than I could ever tell you, my Aberystwyth friends who put me up and fed me at weekends when I was commuting between London and Aber, and my family who still don't understand what a PhD is yet smile, nod and agree.

In December 2010 the tragic loss of my soul mate in particularly difficult circumstances almost ended my PhD. However, months later, I pulled my life back on track and focused on finishing this work I started. I therefore dedicate this submission to the man I loved more than he knew Alex Baldock. I hope he is proud of the 'graft' I have put into this.

## DECLARATION

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# List of Abbreviations

**AG** - Attorney General

**ATCSA** - Anti-Terror Crime and Security Act

**ATCSB** - Anti-Terror Crime and Security Bill

**CP** - Constitutional Principles

**ECHR** - European Convention of Human Rights

**ECtHR** - European Court of Human Rights

**EU** - European Union

**GCHQ** - Government Communication Headquarters

**HC** – House of Commons

**HL** - House of Lords

**HR** - Human Rights

**HRA** - Human Rights Act

**ICCPR** - International Covenant on Civil and Political Rights

**IRA** - Irish Republican Army

**JCHR** - Joint Committee on Human Rights

**MOU** - Memorandum of understanding

**MP** - Member of Parliament

**NGO** - Non-Governmental Organisations

**NS** - National Security

**PM** - Prime Minister

**PTA** - Prevention of Terrorism Act

**PTB** - Prevention of Terrorism Bill

**SIAC** - Special Immigration Appeals Court



**SIS** - Secret Intelligence Service

**SRC** - Security Council Resolutions

**TA** - Terrorism Act

**TB** - Terrorism Bill

**UK** - United Kingdom

**UN** - United Nations

**UNCAT** - United Nation Convention against Torture

**US** - United States

**WMD** - Weapons of Mass Destruction

## Index of Cases:

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- Anti-Terrorism, Crime and Security Act (ATCSA) 2001
- Criminal Justice Act 2003
- Human Rights Act (HRA) 1998
- Immigration Act 1971
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- Northern Ireland Act 1998
- Parliament Act 1911
- Parliament Act 1949
- Police and Criminal Evidence Act (PACE) 1984
- Prevention of Terrorism (Temporary Provisions) Act 1984
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- Special Immigration Appeals Court Act (SIAC) 1997
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# Introduction

Identified as the trigger in the 'War on Terrorism' the events of September 11<sup>th</sup> 2001 and discussion on terrorism have played a central role in United Kingdom (UK) Parliamentary debate.<sup>1</sup> Anti-terrorism legislation has evolved, both domestically and supra-nationally in response to terror atrocities in the UK and overseas.<sup>2</sup> The UK has endured terrorist attacks for decades however, the more recent events of 9/11 not only shaped foreign policy in the UK but also in the wider Western world. The events of 9/11 symbolised the 'vulnerability of us all'.<sup>3</sup>

A number of academics have sought to examine 21<sup>st</sup> century responses to terrorism through various theoretical lenses. Particular attention has been placed on the infringement of human rights. Tsoukala identifies that while academics such as Guild,<sup>4</sup> Bigo<sup>5</sup> and Ewing<sup>6</sup> analyse the nature of state emergency and the relationship between the rule of law and politics in democracy others question on the one hand the frame and the grounds for protection of human rights in present liberal democracies and, on the other hand, the effects of counter-terrorism on social groups and policies that are *a priori* unrelated to terrorism.<sup>7</sup>

Scholars, such as Lazer and Lazer,<sup>8</sup> focus their study on the way public discourses on terrorism have framed the threat, structuring arguments in favour of the introduction of new, liberty-restrictive counterterrorism. However, Waldron<sup>9</sup> suggests that such public discourses show that the legitimisation of infringement of rights was being established in

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<sup>1</sup> The terrorist events which took place in the USA on September the 11<sup>th</sup> 2001 are also known as 9/11. In later discussion, particularly that from the Houses of Parliament, these terms are used interchangeably.

<sup>2</sup> It is important to acknowledge that even with devolved powers to national parliaments, Westminster currently still legislates for the whole of the UK on issues of defence and terrorism along with a number of others. As such, parliamentary debate as used in this research is that of Westminster.

<sup>3</sup> Blunkett, D. (2003); *Integration with Diversity: globalisation and the renewal of democracy and civil society*. Pp. 66.

<sup>4</sup> Guild, E. (2003); *Exceptionalism and Transnationalism: UK Judicial Control of the Detention of Foreign "International Terrorist"*.

<sup>5</sup> Bigo, D. (2008); *Understanding (In)Security*.

<sup>6</sup> Ewing, K. (2007); *'The Political Constitution of Emergency Powers: a Comment'*.

<sup>7</sup> Tsoukala, A. (2008); *Security, Risk and Human Rights: A Vanishing Relationship*. Pp. 1.

<sup>8</sup> Lazer, A. and M. Lazer. (2004); *'The Discourse of the New World Order: "Out-Casting" the Double Face of Threat'*.

<sup>9</sup> Waldron, J. (2003); *'Security and Liberty: The Image of Balance'*.

the name of promoting security. Further, they were grounded in the idea of a balance between security and rights.<sup>10</sup>

With these observations at the forefront of scholarly thought, is there an explicit balance between rights and security in parliamentary debate during review of anti-terrorism legislation in the UK? Three initial influences will be examined to assess this question; first is the establishment of balance. Does balance, as a ratified concept, exist and consequently do Members of Parliament (MPs) make an explicit choice to balance measures or does balance emerge as a product of debate? Examination of whether balance emerges within the debate will be examined in Section II of this thesis through three case studies. The second influence to be reviewed is the understanding assigned to the concepts of rights and security and their associated thematic discussion. Each concept is well established both politically and legally, however, both remain subjective enough to provide flexibility when required. Chapter One will discuss the conceptualisation of both of these concepts. The final influence examines whether the concept of the role of 'balance' is deferred, either directly or indirectly, outside of parliament to the courts. De Londras and Davis, in their article 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Measures', speak of methods of controlling executive behaviour, each separately supporting alternative methods of effective oversight. De Londras places emphasis on the judiciary and the role of the courts whereas Davis calls to look for support from the legislature and popular democratic processes.<sup>11</sup>

Evans and Evans note that examination into the performance of legislatures has previously focused on 'the role of the judiciary; the extent to which international and comparative constitutional law may influence judicial decision making; the role of the executive; and the effects of a bill of rights'.<sup>12</sup> They also argue that scant attention was paid to the role played by legislatures in the domestic protection of human rights, despite their central role in governance and the democratic legitimacy they lend to the recognition and conferral of

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<sup>10</sup> Tsoukala, A. (2008); *Security, Risk and Human Rights: A Vanishing Relationship*. Pp. 1.

<sup>11</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*. Pp. 23/24

<sup>12</sup> Evans, C and Evans S. (2006); *Evaluating the Human Rights Performance of Legislatures*. Pp. 547.

rights. This relationship has arguably been shaped more recently by the introduction of the Human Rights Act (HRA).<sup>13</sup>

The decision to infringe or restrict rights and liberties in favour of extended security must be qualified within the legislative process. Holding both rights and security as equals seems contradictory and untenable; it is difficult to maintain both an ideal of rights relying on internal and external commitments while at the same time being fully committed to the ideal of national security. The central aim of this thesis is to identify the use of 'balance' through specific case studies and consider if this is used to legitimise rights or security in establishing support, or used in rejection of draft legislation.<sup>14</sup> This analysis will be performed on UK anti-terror legislation between the periods of 2001-2006. To reflect this period of anti-terrorism legislative development, three case studies will be reviewed in line with UK anti-terrorism legislation enacted during this period.<sup>15</sup>

#### Methodology:

Parliamentary discussions were selected based on their association with terrorism, security or rights. Debates from both Houses of Parliament were analysed between September 11<sup>th</sup> 2001 and March 30<sup>th</sup> 2006. These dates were selected to allow for a thorough examination of post 9/11 and post 7/7 UK anti-terror legislation. In a similar process to that identified by Huysmans and Buonfino<sup>16</sup> debates were accessed and searched for through Hansard.<sup>17</sup> The review of data initially included every debate containing the word 'human rights', 'security' or 'terrorism'. This process was supplementary to the anti-terror debates already identified.

Content analysis was performed in order to organise the raw data into categories. The categories were developed from the data, rather than from pre-determined categories, as the initial data found from the debate was deemed too broad to fit within a pre-determined set. To ensure familiarity with the data, Hansard was read several times prior to final

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<sup>13</sup> This will be discussed further in Chapter Two.

<sup>14</sup> This will be performed through the examination of political discourse.

<sup>15</sup> These case studies have not included the anti-terrorism legislation specific to Northern Ireland although this was considered in the quantitative review and will receive limited exposure within the quantitative findings in Chapter Three.

<sup>16</sup> Huysmans, J and Buonfino, A. (2008); 'Politics of Expectation and Unease: Immigration, Asylum and Terrorism in Parliamentary Debate in the UK'.

<sup>17</sup> The debate was accessed electronically from the parliamentary website 'Hansard' available <http://www.parliament.uk/business/publications/hansard/>

analysis. Relevant quotes were extracted from the debates and coded based on their content.<sup>18</sup>

Refining the coding process in the second stage of selection involved reading the debates and looking for references to the terms. Unlike the work of Huysmans and Buonfino,<sup>19</sup> the terms selected were not explicitly confined to the specific group of words used to ascertain the initial catalogue of debate as a wider examination was being undertaken. Each discussion point was allocated a coding field of its own as required. The debate categories identified were then read for meaning, structure and connection with other themes.<sup>20</sup> The purpose of this was to understand if, and how, the debates constructed formed a link between rights and security. This research was not designed to be a statistical assessment of parliamentary debate but has used quantitative assessment to support the qualitative findings. The coding process started with a summary of the text being examined, which in this case was the debate found in Hansard. The initial process, known as 'descriptive coding', essentially formed a summary description of what was contained within the transcript and text. This was then broken down further by the coding process through 'analytic or theoretical' coding. The codes here were based on themes, topics, ideas, concepts, terms, phrases and keywords. The coding system in this research is considered to be 'flat' as the coding is non-hierarchical. This quantitative data makes sense of the findings by organising them, summarising them and analysing them. Each statement was counted once from each intervention, regardless of its probable repetitions.<sup>21</sup> In the quantitative findings, percentages refer to proportions of discourses relevant to this study.<sup>22</sup> To provide the most useful data possible, in line with the question presented by this thesis, individual codes were amalgamated into themes. This was designed to offer resilience to later

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<sup>18</sup> Whilst debates were analysed in full, some of the positions presented in debate were not deemed relevant to the coding process. Things that were not coded included comments such as 'I am almost tempted to quote Richter the conductor when he said to the third flute "you're damned nonsense I can stand twice or once, but sometimes always, by God, Never!'. Whilst comments such as these were limited, it is important to acknowledge that they are removed from the coding process. (HC Vol. 439, Col. 532, Sir P. Cormack).

<sup>19</sup> Huysmans, J and Buonfino, A. (2008); 'Politics of Expectation and Unease: Immigration, Asylum and Terrorism in Parliamentary Debate in the UK'.

<sup>20</sup> This connection between themes created the discussion strands for the quantitative presentation of data. E.g. the theme 'Security' incorporated a number of sub codings such as 'threat' and 'risk'.

<sup>21</sup> Tsoukala, A. applied the similar limitations on her research. In: (2006) *Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies*

<sup>22</sup> Discussion presents the security/rights and constitutional principles debate and does not present the wider collection of data such as issues on party politics, existing legislation, and the grouping of misc.



discussion and provide weight, substance and usefulness from the quantitative data. This process was methodised in line with the process identified earlier in this chapter. The content analysis uncovered two key themes: national security and human rights discussion; and discussion on constitutional principles. Due to the specific aim of this thesis, the presentation of the case studies centres on a selection of quotations that are believed to be representative of their whole coverage.<sup>23</sup>

Having identified the lack of attention paid to examination of the legislature, Evans and Evans note two significant challenges to research of this nature. Firstly, is the conceptual analysis, namely, what standard of human rights compliance can the reviewer coherently employ, given that human rights are often contestable and that democratically elected representative institutions often have a legitimate role in identifying their contestability. Secondly, the challenge is to ensure that the methodology is sufficiently nuanced and flexible to accommodate the complexity of the legislative and policy process.<sup>24</sup> A shortfall identified with this study was that, by focusing on parliamentary and judicial discussion through debate, committee reports and judgements, the analysis presented may arguably be deemed too subjective.<sup>25</sup> Given previous criticisms of the susceptibility of content analyses to research bias, steps were taken to reduce this. To reduce the ambiguity and subjectivity which may be attributed to the qualitative data, a quantitative assessment is provided. This data was amassed from the initial coding process. This combination aims to reduce the criticism of the useful nature of quantitative content analysis. This broad content analysis is believed to meet the scope of this thesis.<sup>26</sup>

Focusing on domestic counter-terrorism policies, this thesis seeks to highlight the key arguments used by politicians, opinion leaders, experts and the judiciary. The research is based, at first, on a thematic content analysis of all relevant debate including reports from the Joint Committee on Human Rights (JCHR). Review of the JCHR has been performed because, as Hiebert notes, the JCHR act to assert a role as 'parliamentary guardians' of the

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<sup>23</sup> Tsoukala, A. (2006); *Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies*. Pp. 610.

<sup>24</sup> Evans, C and Evans S. (2006); *Evaluating the Human Rights Performance of Legislatures*. Pp. 549.

<sup>25</sup> For further discussion on the interpretation of debate and judgements see Holland, J and Webb, J., (2010) *Learning Legal Rules*.

<sup>26</sup> For a similar approach in the use of qualitative and quantitative data see Tsoukala, A. (2006); *Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies*. Pp. 609.

Human Rights Act (HRA).<sup>27</sup> The JCHR findings contained within the reports reflect the interpretation of six members from each House of Parliament. Therefore, for the purposes of this research, it is to be representative of parliamentary advocacy and used in conjunction with the case studies. However, the findings have not been incorporated into the quantitative analysis as it was considered that the data accrued from this specialist body, with access to specialist information, could skew the data with its heavy focus on human rights considerations. This decision was further compounded by the aim of this research to assess the discussion undertaken on the House floor. However, key findings have been indicated in the qualitative considerations as the issues raised help in understanding the information and advice to which the Houses of Parliament may have had access if it had arrived in a timely manner for review.

The sheer volume of research undertaken through five years of Hansard, supplemented with committee reports, case law and further scholarly analysis required a filtration process for the information presented. In line with the three acts examined, one case study from each was selected to represent a snap-shot of discussion. The first criterion for selection of the case studies was that the case study had to have been raised as a concern within the JCHR. This ensured that the case study legitimately raised issues of concern to reflect human rights. The second criterion was that each case study had to reference security by the executive as a justification to warrant the measures contained within the Bill. Each of the case studies, therefore, raised explicit debate on both rights and security measures as a result of the government proposals. Each case study aimed to offer insight into if, and how, the process of 'balancing' one criterion over the other was presented.

Case law also played an integral role in this thesis based on its influence in shaping legislation. A brief review of case law is presented in the introduction to Section II to provide a contextual backdrop to the framework, parameters and constraints in which the executive and the legislature felt they had authority to work. Further examination of the influence of case law and the role of the judiciary will emerge as a theme throughout this examination in particular, the role of the judiciary as an oversight mechanism.

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<sup>27</sup> Hiebert, J. (2005); Parliamentary Review of Terrorism Measures. Pp. 677.

Following the same rationale as that applied by Huysmans and Buonfino, this analysis does not seek to evaluate the constitutive or causal impact of parliamentary language in anti-terrorism legislation. This research seeks to understand the terms through which the political elite in the UK modulated the rights and security nexus through political discourse. These are important in defining both the politically sanctioned language of public debate, its central dividing lines and identifying what fills the gap if balance is not identified within parliamentary debate.<sup>28</sup>

#### Limitations of this study:

As with any research there are some limitations which must be noted. Firstly, by reflecting only a snap-shot of the legislation through the lens of a specific case study for each Bill the validity of any summative conclusion is weakened. As stated at the outset, it was not the intention of this thesis to provide a definitive answer to the balance dilemma but to investigate whether balance is explicitly used in the creation of legislation.

Another limitation of this study is the imprecise and sporadic nature of the debate found within the Houses of Parliament. Lack of coherent debate may result in the lack of clarity emerging from the examination of the rationale, effectiveness, and legality of measures. Throughout debate evidence exists that a number of concerns were raised, however, the encapsulation of significant examination does not emerge, leaving issues of clarity and legality unchecked beyond their superficial acknowledgment.

A further limitation of this study is the difficulty in the evaluation of rights and security based on the contestability of their composition. As Evans and Evans identify, the subjectivity of the concepts gives rise to 'pervasive disagreement'. This is particularly so with rights. What one group may regard as a step forward for rights another may regard as a violation of rights. This contestability means that in many instances there is no external standard to which the evaluator can appeal.<sup>29</sup> This further diminishes the ability to delineate definitive answers.

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<sup>28</sup> For similar process in coding see - Huysmans, J and Buonfino, A. (2008); 'Politics of Expectation and Unease: Immigration, Asylum and Terrorism in Parliamentary Debate in the UK'.

<sup>29</sup> Evans, C and Evans S. (2006); Evaluating the Human Rights Performance of Legislatures. Pp. 550/551.

This study will focus on the UK parliamentary system and, whilst some of those who comment speak of comparisons with other Commonwealth nations such as Canada and Australia, the scope of this thesis does not allow for expansion on, or cross-examination of, the procedural similarities or differences which may exist.

This research does not have the capacity to immerse itself in the wider constitutional issues which may be raised. This research looks to examine the working relationship between the executive, the judiciary and parliament through the lens of rights and security dialogue. Associated issues of separation of powers, judicial review and rule of law, whilst mentioned, the methodology chosen in order to isolate and analyse the security and rights dialogue does not really touch on or reveal useful analytical consideration of these concepts.

Whilst a number of documents were available for analysis including ministerial speeches, the media and committees such as the Home Affairs Committee, these have been omitted from this political discourse analysis. Although each of these texts offer enriching discussion, alternative insights, overviews and further assessment of the legislation examined in this thesis, only the JCHR emerged more than occasionally within the coding of the material located within Hansard. Ultimately, whilst an eclectic array of supporting materials and discussion exist outside of those examined within the case studies, the aim of this thesis remained to consider and critically review the political discourse presented within the Houses of Parliament, and this discourse selected its own literature and dictated the materials to be considered in this thesis. Similarly, the core analysis in the thesis is of the discourse rather than the content of those other documents, consideration of their content is used to give context and allow critical assessment of the law-making discourse.

This research will not focus significantly on the historic notion of human rights. This thesis recognises the existence of both theoretical and legal rights and their protection under various statutes. It, is not a definitive piece of research into human rights adjudication but rather an exploratory investigation, however, although a brief overview is presented, the wider theoretical debate associated with human rights will not be documented here. In line with the restrictions identified on constitutional issues, this methodology has been chosen in order to isolate and analyse the security and rights dialogue within parliamentary debate and, as such, does not reveal any useful analytical consideration of these concepts.

### Overview of thesis:

Section I of this thesis contains a brief presentation of influential theoretical concepts, constitutional principles and the quantitative findings relevant to the focus of this research. Chapter One will look at key concepts that penetrate the discussion on balance, rights and security. The aim of presenting the concepts raised by the examination of debate is to eliminate wider unrelated discussion which, from the findings, offers little direction or bearing on the case studies examined. Chapter Two will discuss the performance of balance through current oversight mechanisms. The final chapter, in Section I, will present the quantitative findings from the coding displaying a statistical indication of the debate attributed to rights, security and constitutional principles.<sup>30</sup> Following the focus on key findings within anti-terrorism legislation, a brief narrative will be provided identifying substantive areas of discussion outside the case studies examined. These have been included based on the potential influence they may have had on the direction of anti-terror specific debate or subsequently account for why some positions went unchallenged in the primary focus.

Section II focuses on the specific case studies and reviews the extent to which rights, security and their balance emerge. The case studies are not reflections on the quantitative study, nor are they used to present a subjective view-point of what constitutes a powerful or implied debate. What they aim to do is establish whether a balance of the conceptual influences was evident in the approach adopted by parliament to substantiate the claims in favour of or against security and rights.

Chapter Four looks at the necessity of derogation from the European Convention of Human Rights (ECHR) based on the potential detention without trial of non-national terror suspects.<sup>31</sup> Examination of the JCHR reports will be presented and followed by a thematic review of the Houses of Parliament dialogue on derogation. This chapter also incorporates a separate debate on human rights which was held during the limited gestation of the Bill. This debate on human rights was deemed too substantive to omit from the examination as

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<sup>30</sup> This chapter will present only the findings from the House of Commons. The rationale for this was that, in line with the rationale for using case studies, this research has only limited capacity. As such, a snap shot of the quantitative findings was also found to be appropriate given the scope and the aims of the thesis. The House of Commons was therefore selected based on the democratic nature of its composition.

<sup>31</sup> Found within Part 4 ss21-23 ATCSA 2001.

it may have been a key influence in the decision-making process. Following this examination of the Anti-Terror, Crime and Security Bill (ATCSB) 2001, a prelude to the examination of the Prevention of Terrorism Bill (PTB) 2005, will be presented. Following the detention of sixteen non-nationals under Part 4 regulations, and concern raised by the Privy Council and other agencies, particularly Non-Governmental Organisations (NGOs) such as 'Liberty', the Home Office maintained Part 4 as essential and shelved the alternatives as unworkable.<sup>32</sup> As Walker notes, 'there the matter rested until the judges intervened and forced a rethink'.<sup>33</sup> As a result of the judicial intervention, deeming ss 21-23 ATCSA 2001 incompatible with the ECHR, a brief assessment of *A v Secretary of State (Re A)*<sup>34</sup> is presented to act as a bridge into the following chapter.

Chapter Five reviews debate on the introduction of control orders found in the PTB 2005 in light of the House of Lords judgement in *Re A*.<sup>35</sup> Control orders fell into two categories depending on their severity; derogating and non-derogating orders. Both types of control order operated within different procedural parameters, most notably from the debate on the standard of judicial review afforded to the differing process. This case study will examine the debate undertaken on procedural differences of the two processes and will incorporate discussion on the proposed extension of powers awarded to the Home Secretary.

Chapter Six presents the final case study; this focuses on the proposal of 90 day pre-charge detention found within the Terrorism Bill 2005. The Times illustrated that 'the origins of the Act can be located in the London bombings of July 2005'.<sup>36</sup> Walker suggests that, at the same time, the Act was being used to implement the Council of Europe Convention on the Prevention of Terrorism of 2005. The police powers of detention after arrest were extended to 28 days, and not 90 days, after Parliament rejected the proposal.<sup>37</sup> A review of the debate presented in this rejection will be discussed here. This particular chapter acknowledges that amendments to the draft Bill were made prior to review by the House of Lords. However, on

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<sup>32</sup> Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper Presented to Parliament by the Secretary of State for the Home Department. (2004); Part 2 Para 31.

<sup>33</sup> Walker, C. (2006); *Clamping Down on Terrorism in the UK*. Pp. 1140.

<sup>34</sup> [2004] UKHL 56.

<sup>35</sup> Ibid

<sup>36</sup> The Times, 6 August 2005.

<sup>37</sup> Walker, C. (2006); *Clamping Down on Terrorism in the UK*. Pp. 1141/1142.

arrival at the House of Lords, the legitimacy and necessity of 90 day pre-charge detention were still debated. From this debate in the House of Lords an amendment from 28 days pre-charge detention to 60 was proposed. This, however, failed to receive the required support in the House of Lords and, therefore, did not progress back to the House of Commons for further debate. A brief review of this 60 day debate will be examined in this chapter as to omit it may give rise to improper oversight.

The concluding chapter draws on the findings represented to identify whether, and how, the balance between human rights and national security is lobbied in anti-terror legislation<sup>38</sup> and the influence of wider overarching issues such as the function of oversight mechanisms. A brief summary of the main findings of this thesis will be presented, supported by discussion of the political and constitutional implications this research has unearthed. This will include discussion on the relationship between the executive, legislature and the judiciary; a discussion which remains an important underlying issue in the quest for balance in the security and rights debate.

#### Concluding remarks:

The ambition in this thesis is not to decisively resolve the considerable challenges in the 'balance' between rights and security. Instead, the aim is to demonstrate the substance of debates associated with specific case studies relevant to each Bill examined. If equally important commitments to rights and security are demonstrated then balance becomes not a balance between the concepts themselves, but requires a review into the institutions which scrutinise rights and security. Hence, this thesis progresses to review its emergent findings through a lens of the discourse related to the competing functions of the judiciary, the legislature and the executive, assessing the findings through an 'effective oversight' paradigm.<sup>39</sup>

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<sup>38</sup> An act of terrorism offers society a means to reaffirm human bonds that have been corroded and draws on the emotive nature of human kind. It is also an area of recent debate and public interest. This is why this area of legislation was selected over others.

<sup>39</sup> De Londras, F and Davis, F. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism. Pp. 23.

# Section I



# Chapter One

## Emerging themes and concepts identified in the rights and security debate:

*'The choice between security and liberty is a false choice...insecurity threatens liberty'.<sup>40</sup>*

### 1.1 Overview:

The purpose of this thesis is to determine whether a 'perceived' balance between security and rights was demonstrated within the legislation scrutinised and more specifically through the case studies examined.<sup>41</sup> Security<sup>42</sup> and rights both have their own heritage grounded in legislation and theory and, while often assumed to be in conflict, the two concepts are not necessarily so. This chapter will not provide an in-depth historical account of rights and security, but rather a number of thematic concepts which emerged from the analysis in the debate when reviewing the existence of balance between security and rights. This chapter looks into a number of emergent themes specific to the anti-terror debate reviewed; what this research does not have the capacity to do is examine the underlying rationale for political agendas.

As mentioned above, following a brief introduction, a number of thematic concepts will be discussed. On such an emotive and politically driven subject as the response to terrorism it became apparent, from the outset, that a significant number of theories and scholarly interpretations existed. The concepts demonstrated in this chapter are by no means exhaustive, nor are they intended to be; rather this discussion is reflective of the debate that emerged from the Houses of Parliament.<sup>43</sup> As noted earlier, this dialectic display of opinions underpins the limitations acknowledged in the methodology.

This chapter will start out by addressing a brief review of human rights, including conceptual interpretations and theoretical perspectives underpinning rights in an age of terror. It will

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<sup>40</sup> National Commission on Terrorist attacks upon the United States (9/11 Commission) Report 2004. Pp. 395.

<sup>41</sup> Unique to each act, the case studies will be reviewed in line with the methodology outlined in the introduction. These findings will then be examined in Section II of this thesis.

<sup>42</sup> It is important to note that for the purposes of this thesis, when speaking of security we are speaking of security of the population through the protection of national security.

<sup>43</sup> This chapter will not review the issues associated with constitutional principles and the influence of the judiciary. This assessment will be performed in Chapter Two of this thesis.

further encompass a review of rights in light of their relationship with security measures. This review will not provide a historical account of rights beyond identifying the foundations of their legalisation. This is because, for the purposes of this research, review is undertaken within the legally protected framework of human rights under the European Convention of Human Rights (ECHR) and the HRA. As such, the origins and legitimacy of human rights are not disputed although varying interpretations of ways to protect them remain evident. The inclusion of this discussion aims to provide sufficient backdrop to rights discussion when considering the strengths and weaknesses of parliamentary debate.

Following this the concept of 'security' will be addressed. This will explore what is meant by 'security' for the purpose of this thesis and present the possibility of collective security as a right in itself. Ultimately this review will reflect security as implied from the debate. This chapter will then move on to look at influences on the justification of 'security'. This examination draws on the three central themes to emerge from the debate analysed, namely; risk, pre-emptive measures and the availability of evidence and intelligence. These themes were used in the debate not only as a tool for justifying moves but also used as a benchmark for challenge. The final emergent theme for review in this chapter looks at the quest for balance.<sup>44</sup> Significant scholarly explorations exist on the notion of balance, whether it exists, how it is framed, what the constraints on balance are, and the wider implications of balance.<sup>45</sup> This examination does not open up all of these areas, rather it considers how the idea of 'balance' is presented particularly in light of security and rights. This focus is chosen because, in looking at rights and their reconciliation with security, innumerable themes are illustrative of the difficult juxtaposition of rights and security in which a delicate balance may be less in evidence than a fervour for erosion of rights in response to a perceived crisis. As such, in a bid to protect security, rights may be infringed calling on the notion of balance to justify such measures. Finally, concluding remarks will guide the reader into the following chapter with a focus on oversight mechanisms and their role in performing balance between rights and security.

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<sup>44</sup> This looks at the 'conceptual' understanding of balance.

<sup>45</sup> Such scholars include Golder, B and Williams, G. (2006); Ashworth, A (2007); and Zedner, L (2005). Further discussion on balance will be undertaken later in this chapter.

## 1.2 Scholarly thought:

Prior to moving into the thematic assessment of discussion it is important to explore some of the scholarly work which has been undertaken since the events of 9/11 as such works undoubtedly feed into the wider context of this thesis. There exist numerous analyses on the various relationships between security and rights. For example, Lazarus and Goold<sup>46</sup> document the search for language reconciliation between security and rights; Zedner<sup>47</sup> reviews the sidestepping of due process in seeking security by eroding rights; Gearty<sup>48</sup> reviews the principles of rights adjudication and Douzinas<sup>49</sup> reports on the end of human rights.<sup>50</sup> Each of these scholars has taken rights and security and reviewed them in line with their present interpretation of the subject matter, with each analysis conveying varying political, social and legal implications. The fact that security and rights are rich in thought-provoking text, and fluid in interpretation, is a root cause of the 'perceived' need to balance. No formula exists to provide a definitive framework in which to interpret rights or security. As such, the boundaries within which these concepts are reviewed are flexible. Ashworth notes a key problem in producing a definitive framework is that the list of rights remains open to debate, further constricted by the broad manner in which rights are drafted, thus leaving much to interpretation.<sup>51</sup> With broad definitions of rights, and the potential for rhetorical manipulation of security, it is unsurprising that debate regarding balance has a role to play in anti-terrorism legislation.

It is clear from the outset of this examination that both rights and security are well established legally and theoretically. The integrity of each concept, however, has varied historically in the protections it has been afforded. These variations have been based on fluctuating interpretations of priority, need, constitutional principles, and established heritage. This overview of rights, security and associated values, is by no means exhaustive. This chapter aims to provide a backdrop to some of the substantive concepts which arose within the case studies examined.

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<sup>46</sup> Goold, B and Lazarus, L. (2007); Security and Human Rights.

<sup>47</sup> Zedner, L. (2007); Seeking Security by Eroding Rights: The Side Stepping of Due Process.

<sup>48</sup> Gearty, C. (2005); Principles of Human Rights Adjudication.

<sup>49</sup> Douzinas, C. (2000); The End of Human Rights.

<sup>50</sup> This list is not exhaustive.

<sup>51</sup> Ashworth, A. (2007); Security, Terrorism and the Value of Human Rights. Pp. 204.

### 1.3 Theory of human rights:

Human rights are legally protected and currently form part of an expanding repertoire. 9/11, and the ensuing 'War on Terrorism', test the limits of just how rights can be used, are relied upon, manipulated and overridden.<sup>52</sup> On the fiftieth anniversary of the Universal Declaration of Human Rights Mary Robinson highlighted the significance of human rights claiming:

'We must learn that human rights, in their essence, are empowering. By protecting human rights, we can create an environment for living in which each individual is able to develop his or her own gifts to the fullest extent. Providing this assurance of protection, in turn, will contribute to preventing so many of the conflicts based on poverty, discrimination and political oppression which continue to plague humanity'.<sup>53</sup>

Douzinas argues that 'there can be no general theory of human rights'<sup>54</sup> but that scholars, in discussing rights, draw on a number of common themes. The consideration of rights here is to delineate how individual rights and what are termed collective rights which states must provide – such as security, might be separated and differently understood. This discussion is necessary as it is not always clear that any separation is understood by the law makers.

Even though rights are established, individual interpretation of rights is fundamental to a deeper understanding of the influence which rights hold in cases of 'balance'. This fluidity can lead to misinterpretation by MP's and facilitates the misuse of rights compromising their protection. Rights, as understood in modern society, are largely the product of Western thought.<sup>55</sup> In identifying three ways in which rights are generally understood Waldron suggests firstly; a right is nothing but a particularly important interest: it is assigned a greater weight than ordinary interests and therefore counts for more in utilitarian or other welfarist calculations. Secondly, according to Waldron, interests protected by rights are given lexical priority over other interests. They are to be protected and promoted to the greatest extent possible before other interests are taken into consideration. Thirdly, and

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<sup>52</sup> Fitzpatrick J. (2003); *Speaking Law to Power: The War against Terrorism and Human Rights*. Pp. 242.

<sup>53</sup> Mahoney, J. (2007); *The Challenge of Human Rights: Origins, Development and Significance*. Pp. 45-58.

<sup>54</sup> Douzinas, C. (2000); *The End of Human Rights*. Pp. 4.

<sup>55</sup> Mahoney, J. (2007); *The Challenge of Human Rights: Origin, Development and Significance*. Pp. 1.

most controversially, Waldron suggests that rights are understood not as specially or lexically weighted interests, but as the basis of strict constraining requirements of action. Rights, in other words, define the boundaries of practical deliberation.<sup>56</sup> Each of these interpretations allows viewing of the lexical weight given to a position of rights dependant on the lens through which they are viewed offering a practical, not historical, way to view the application of rights. The question, therefore, becomes how we expose the underlying rationale of a particular rights interpretation, if indeed it is possible at all. Any right-based moral or political theory has to face the issue whether the rights it endorses are 'natural' or 'human' rights; are they universally valid and determinable; or are they historically determined by the concrete institutions of a particular society?

In his lecture in 2006, Professor David Feldman discusses the necessity of worrying about the protection of rights. He identifies that democracy must maintain the moral and ethical high-ground suggesting that an essential strategy in countering the extremism that breeds terrorism is to win 'the contest of ideas' by rigorously defending basic human rights and freedoms.<sup>57</sup> This position is supported by Von Doussa who notes that this task becomes infinitely more difficult if democracies undermine their own human rights credentials. Undermining principles can be prevented by commanding a rigorous review process of policy prior to enactment.<sup>58</sup> As such, the compromise of rights in favour of security, or vice versa, must be adequately weighed.

The compromise made between rights and security, however, requires consideration of whether rights and freedoms are good in themselves and, more specifically, whether such freedom is a good thing as seen through a deontological view or whether it is only 'good' whilst contained within certain frameworks as viewed by the teleological approach. Presenting a deontological stance, Rawls recognises that there are certain specific and basic liberties which should be entrenched in a constitution.<sup>59</sup> Hart, however, through the teleological (or choice) approach argues that freedom and liberty should not be more valued than an improvement in the general material conditions of the whole of society. Ultimately liberty is not prioritised. This singles out the rights bearer in virtue of the power he has over

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<sup>56</sup> Waldron, J., (1984); *Theories of Rights*. Pp. 15.

<sup>57</sup> Feldman, D. (2007) 'The Roles of Parliament in Protecting Human Rights: A View from the UK'.

<sup>58</sup> Von Doussa, J. (2006); *Reconciling Human Rights and Counter-Terrorism – a Crucial Challenge*. Pp. 105/106.

<sup>59</sup> For further discussion see: Rawls, J. (1999); *A Theory of Justice*.

the duty in question.<sup>60</sup> Defenders of choice theories argue that a person has a right when others have duties which protect one of that person's choices.<sup>61</sup> Both these positions present the dichotomy frequently associated with rights and freedoms. If, in itself, freedom of the individual is a 'good' then arguably it is necessary to limit any interference with this freedom, certainly state power needs to be curtailed, even where it is being exercised for the collective good. If individual freedom is not necessarily a 'good' in its own right but only when it fulfils other purposes, then it is legitimate to curtail freedom to the extent that it does not advance the 'good' which is being prioritised, or at least should never be allowed to operate when it will jeopardise that 'good'. This becomes more complicated when various goods are in conflict as demonstrated here.

Even though both deontological and teleological theories exist, the strongest principle in the Western world is based on liberal rights discussion and scholarly thought. This particular approach looks at the respect for one another's moral autonomy. Accordingly, each individual should be allowed to select their own identity. Outside of these theories, Waldron identifies the benefit or interest theory as recognised by Bentham,<sup>62</sup> and later Raz.<sup>63</sup> This suggests that an individual (1) has a right if another individual (2) has a duty to perform some act or omission which is in the interest of individual (1). Therefore, the benefit in the interest theory should only be to the intended individual and consequential benefit does not accrue.<sup>64</sup> Falling between both teleological and deontological, Raz believes that whilst people are autonomous and, therefore, should be able to choose for themselves, he also acknowledges that such freedom is valuable largely because it protects the collective good. As such, Raz takes the middle ground in that freedom is necessary to increase individual autonomy and choice so that each individual may act for themselves, even if that is contrary to the best interest of the state or the culture, and it is important in order to protect the culture.<sup>65</sup> Debate between choice and interest theories has been related to aspects of 'moral personality'. They have been seen as protections for interests related to choice and, therefore, duties correlative to rights are mainly negative in character. In any such theory,

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<sup>60</sup> Hart, H. (1984); Are there any Natural Rights? Pp. 77-91. In Waldron, J. (1984); Theories of Rights.

<sup>61</sup> Rainbolt, G. (2006); 'Rights Theory' Philosophy Concepts. Pp. 4.

<sup>62</sup> Bentham, J. (1781); An Introduction to the Principles of Morals and Legislation.

<sup>63</sup> Raz, J. (1984); 'Rights based Moralities'. Pp. 182-200. In Waldron, J. Theories of Rights.

<sup>64</sup> Waldron, J. (1984); Theories of Rights. Pp. 9-12.

<sup>65</sup> For further discussion see Raz, J. (1998); The Morality of Freedom.

not every interest will be regarded as a right. These interpretations, combined with the earlier identified array of interpretations available of how rights are understood, provide a backdrop for political clashes in justifications, validations and influence from the rights / security nexus.

In cases of conflict there should be significant review of the deep considerations which back them up.<sup>66</sup> Further to this, it is also established that international human rights law recognises that, in some instances, emergencies may justify a suspension of some international human rights protections.<sup>67</sup> Each of these acknowledges that not all rights are absolute and that some instances require relative assessment. This flexibility exposes weakness in the system of protections, thus reaffirming that the broad manner in which rights are drafted leaves too much to interpretation. Such width leaves individuals susceptible to having rights encroached on, made redundant or squeezed to such an extent that they are almost unrecognisable. It may be argued that politicians rely on this flexibility to guide interpretations and decisions however, this can leave them exposed to producing an interpretation that is incompatible with the wider democratic picture. Politicians are not alone in vulnerability of rights' interpretations. Judges are also left vulnerable in balancing the rights of individuals, deciding how rights are protected and further, whose rights should be protected.

In his examination reviewing the notion of an end to human rights, Douzinas acknowledges the claim by Dworkin that rights are restraints on social policies and political choices. As a result of this, they have a threshold weight in relation to collective goods against which they act as trumps. However, using the example of anti-terror legislation Douzinas notes that governments, in responding to terror, legislate drastic restrictions exploiting 'widespread revulsion against the perpetrators'.<sup>68</sup> As such, the trump of rights is of little value when these rights come 'into direct conflict with strong surface and illiberal emotion'.<sup>69</sup> Ultimately for Douzinas, these examples of legislating in such settings demonstrate 'the instances

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<sup>66</sup> Dworkin, R. (1984); *Rights as Trumps*. Pp. 153-167. This is also presented by Gewirth, A. (1984); 'Are There any Absolute Rights?' Pp. 91-109.

<sup>67</sup> Hoffman, P. (2004); *Human Rights and Terrorism*. Pp. 951-952.

<sup>68</sup> Douzinas, C. (2000); *The End of Human Rights*. Pp. 250.

<sup>69</sup> *Ibid.* Pp. 250.

where the protective value of human rights is at the highest, but their effectiveness at the lowest'.<sup>70</sup>

Irrespective of what human rights position is adopted, in the UK at present the law illuminates and formalises a number of different rights theories and political discussion. It takes them all and creates law that has to be obeyed even when there is strong evidence to suggest such measures are wrong. It seems an impossible task to explicitly ascertain an overarching and universally appealing standpoint of human rights rhetoric. This not only complicated the attempt to elicit a balance of rights and security from the case studies, it further diluted the ability to ascertain real meaning in the political understanding of what the notion of rights stand for. Indeed, it may be conceded that to anticipate such definitive categories of human rights may undermine the diversity of political affiliations accrued in parliament. As Douzinas notes, 'no grand synthesis can arise from such a cornucopia of philosophical thought'.<sup>71</sup> It may be considered that each human rights interpretation is underpinned by a number of external influences, some of which will now be discussed.

As such this thesis, rather than focusing on the emergence of particular theories of rights, looks to identify if and how individual rights of the person are balanced against justifications of security. As identified earlier, this is complicated by the fluid meaning of rights and can lead to the misrepresentation of rights with potentially harmful results. Having established a backdrop to human rights, this chapter will advance to establish some overarching considerations within the concept of security.

#### **1.4 Security: the collective impact:**

'Security' in the context of national security and rights is a contested matter. It generates questions of whose security is protected and whether public security can be protected by maintaining national security (although interpretations are not limited to this). Whose security counts? Is it society, the state, a group or an individual? Whilst focusing on the security of the state may damage the security of individuals within it, likewise emphasising the security of individuals may make it difficult for states to respond optimally to threats. It

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<sup>70</sup> Ibid. Pp. 250.

<sup>71</sup> Douzinas, C. (2000); *The End of Human Rights*. Pp. 21.



is, therefore, not clear or obvious whose security takes precedence or within which parameters these questions operate.<sup>72</sup>

While it is recognised that individuals have rights, legislation also recognises that this includes the right to security and ultimately a right to life.<sup>73</sup> Governments must, therefore, employ strategies to protect these rights.<sup>74</sup> The Canadian Attorney General Irwin Cotler<sup>75</sup> and Australian Attorney General Phillip Ruddock<sup>76</sup> both suggest, however, that the assumed animosity between rights and security can be reconciled through reconceptualising counter-terrorism legislation as 'human security legislation'. This is directed towards securing the necessary preconditions for the enjoyment of human rights themselves.<sup>77</sup> Cautious of this, Hoffman suggests that interpretations and strategies such as these must not be at the expense of individual human rights. As such, to accept the perception of anti-terror legislation as human security legislation may infringe on rights, but through a rhetoric shrouded by the offer of greater support to security.<sup>78</sup>

There is clear theoretical grounding in Western<sup>79</sup> thought of the primacy accorded to the state in response to security management. Theorists,<sup>80</sup> such as Hobbes, propose that humans traded their individual sovereignty upwards in return for protection. Locke indicates that people chose the charter of their state and government, and consequently, therefore have obligations to state authority. Weber argues further that 'a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory'.<sup>81</sup> In an article on state crime, Williams asserts however that not all force by a state is justified. Justification for force can only be established as legitimate when

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<sup>72</sup> MacFarlane, N. (2007); Human Security and the Law of States. Pp. 348/349.

<sup>73</sup> ECHR Article 2 – the right to life.

<sup>74</sup> Whilst security of the individual is explicitly protected, 'collective security' is not a 'right' in the pure, legal, sense. It is however one of the 'interests' which states can use to contain some rights.

<sup>75</sup> Cotler, I. (2001); Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy.

<sup>76</sup> Ruddock, P. (2004); A New Framework – Counter-Terrorism and the Rule of Law.

<sup>77</sup> For a further examination of this see: Golder, B and Williams, G. (2006); Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism. Pp. 44.

<sup>78</sup> Hoffman, P. (2004); Human Rights and Terrorism. Pp. 949-950.

<sup>79</sup> See authors such as Hobbes, T, (1985); Leviathan; Fredman, S. (2007); The Positive Right to Security; Lazarus, L. (2007); Mapping the Right to Security.

<sup>80</sup> These are not the only theorists, but two prominent thinkers on the issue and are used only as an example of ideas rather than as a presentation of the correct theory.

<sup>81</sup> Weber, M. (1919); Essays in Sociology [online]. Translated by H. H. Gerth and C. Wright Mills. New York: Oxford University Press. pp. 77-128. Available at: [http://socialpolicy.ucc.ie/Weber\\_Politics\\_as\\_Vocation.htm](http://socialpolicy.ucc.ie/Weber_Politics_as_Vocation.htm) (Accessed 23/07/13).

the force is considered 'proportionate' enough to restore social order. Williams however argues that this ends-based definition is unsatisfactory. For Williams, this is because it not only takes 'the state as the point of departure for legitimising its own behaviour', but also because 'the restoration of order is subjective'.<sup>82</sup> As such, the state in deciding the legitimacy of force and the framework, within which social order is to be restored, both defines most crimes and is the authority under which crimes are prosecuted.<sup>83</sup> The security concerns of individuals are therefore bundled into the state collectivity.<sup>84</sup>

Dworkin notes that 'rights are best understood as trumps over some background justification for political decisions that state a goal of the community as a whole'.<sup>85</sup> The influence of the notion of state collectivity is further underpinned by institutional frameworks. United Nations (UN) Security Council Resolutions (SRC) such as 1373 explicitly require states to protect their citizens and have subsequently been relied upon by states in the justification of potentially draconian moves. On the backdrop of this, and the vast theory which discusses the concept of security in the rights framework, 'security' for the purposes of this thesis will be examined through the lens of 'collective security' ascertained through the protection of national security.<sup>86</sup> States take their duty to protect their citizens seriously endorsed by constitutions. The basis for collective security is constituted by collective identity of mutual responsiveness developed and determined by a common response. In view of the foregoing, it is easy to understand that collective identities and shared values as well as shared understandings as regards threat perceptions, are of significant importance in supporting the notion of collective security. As such, collective security is based on the formation of a common identity of like-minded selves in opposition to the perceived enemy.

#### **1.4.1 'Security' the force multiplier:**

In Europe, terrorism presents an unavoidable dilemma between striving to protect citizens from attacks while upholding the rights enshrined in the ECHR. Human rights safeguards do not constrain states from enacting far-reaching offences with high maximum penalties, as

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<sup>82</sup> Williams, K. (2010); *State Crime*. Pp. 742.

<sup>83</sup> Ibid. Pp. 742.

<sup>84</sup> MacFarlane, N. (2007); *Human Security and the Law of States*. Pp. 350.

<sup>85</sup> Dworkin, R. (1984); *Rights as Trumps*. Pp. 153.

<sup>86</sup> Individual security is therefore offered protection through the notion of rights.

long as the laws are clear and the penalties not so disproportionate as to breach Articles 3 or 5 ECHR.<sup>87</sup> This reiterates that it is not incompatible with rights for states to respond to threats providing that the actions undertaken are justifiable and proportionate.<sup>88</sup> Definitions depend on states' perception about threats and safety. Thune argues that, on security, 'no precise definition has ever been achieved and probably never will be'.<sup>89</sup> The term security ultimately remains a vague concept.

Whilst support for security over rights is frequently driven by the presumption of the greater good, others maintain that coercive measures in support of security are not the answer to resolving threats but can, in fact, fuel reactionary movements.<sup>90</sup> This was ascertained earlier in the assessment of Waldron's interpretation of goal based duties/rights. Although resistance to coercive measures was evident from the examination undertaken, Zedner maintains that 'security' is so powerful an aspiration that it tends to trump all other considerations and silence countervailing concerns. The rhetoric utilised to portray the importance of security in modern terms relies heavily on the populist response. This was refined further by the need to be 'seen' to be doing something.<sup>91</sup> 'Security', therefore according to Zedner, can carry with it license for draconian measures.<sup>92</sup> These measures are fundamentally driven by the 'unknown' and are effectively argued based on residual risk to the public.<sup>93</sup> While the ability to 'prove' threat is often difficult, the ability to prove that the threat does not exist is just as problematic. The impossibility of knowing these threats can generate a state of fear and allow for manipulation of the unknown into becoming justifications for legislative 'protections'. This position is reaffirmed by Ignatieff who emphasises that:

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<sup>87</sup> Ashworth, A. (2007); *Security, Terrorism and the Value of Human Rights*. Pp. 207.

<sup>88</sup> The request for justification and proportionality is in line with the notion of risk, and pre-emptive action. Both of which will be reviewed later in this chapter.

<sup>89</sup> Thune, C. (1988); *Problems of Transition*. Pp. 87.

<sup>90</sup> For examples of this support see HC Vol. 375, Col. 395, D. Abbott; Vol. 431, Col. 156/157, D. Davis.

<sup>91</sup> 'I do not think that some of the comments we have heard truly chime with the concerns and fears of the British public. We would be doing them a great disservice if we were to ignore the real threat posed against them. I also do not think that we would ever be forgiven if there was a serious attack on this country and it was later shown to have been preventable if we had taken the action necessary to plug gaps in our law'. (HC Vol. 375, Col. 104, S. McCabe).

<sup>92</sup> Zedner, L. (2007); *Seeking Security by Eroding Rights*. Pp. 257. Also see Dworkin, R. (2003); 'Terror and the Attack on Civil Liberties'.

<sup>93</sup> Residual risk is considered to be the remaining potential for harm to persons, property or the environment following all possible efforts to reduce predictable hazards.

‘The political costs of under reaction are always going to be higher than the cost of overreaction...Since no one can know in advance what strategy is best calibrated to deter an attack, the political leader who hits hard – with security roundups and preventative detentions – is making a safer bet, in relation to his own political future, than one who adopts the precautionary principle of ‘first do no harm’.<sup>94</sup>

Bigo and Guild suggest that post 9/11 security rhetoric has produced an ‘insecuritisation’ of the world. This ‘insecuritisation’ can allow for arguments of self-defence through national security in order to protect citizens.<sup>95</sup> This may indicate that ‘self-defence’ and ‘collective security’ are synonymous with one another and, as such, when used interchangeably may legitimise the justification for legislation.

What this brief overview of security identifies is that there are a number of factors which have to be considered in modern politics to justify that ‘security’ is assigned a particular status comparable with rights. These factors include justification, accountability, necessity, and proportionality - all of which trigger examination of risk and associated actions. Each of these is compounded by the influence of rhetoric and the manipulation of the public response. This has been further framed with initial responses to 9/11 through the paradigm of war.<sup>96</sup> Having established that the notion of security requires the satisfaction of certain pre-conditions, a brief insight into emergent themes from the examination of debate will now be presented. Each of these themes is used as a proponent for supporting rights and security at various stages within the debates examined, most of which were framed within the oversight of security; both positively and negatively.

### **1.5 Influences in the justification of security:**

As identified above, security, or at the very least the justification for security, is contributed to by a number of factors. The notion that the rules of the game have changed and that the threat from international terrorism places the nation at grave risk of attack pressurises the boundaries of balance between rights and security. By ignoring the claim that the ‘rules of the game’ have changed we place our lives and the lives of others in jeopardy. However,

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<sup>94</sup> Ignatieff, M. (2005); *The Lesser Evil: Political Ethics in an Age of Terror*. Pp. 58.

<sup>95</sup> Bigo, D. and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 108.

<sup>96</sup> This will be reviewed in the following chapter.

acceptance of these claims of risk and threat is not clinical.<sup>97</sup> The importance of rights in the UK is embedded within constitutional protections underpinning democracy. Parliament should perform their review functions grounded within the framework of 'justification' and 'necessity'. The quality of proof and reasoning therefore becomes the litmus test for legitimising 'risk' and its associate proponents. Dialogue is undertaken between the constitutional actors who represent the political and legal, through the legislative, executive and judicial functions.<sup>98</sup> However, the impossibility of eradicating risk becomes apparent, ultimately determining the realistic benchmark in just how far measures should be stretched in favour of security or rights.

The ability to demonstrate these criteria can place the executive in a vulnerable position. As Freedman notes 'Governments that say nothing when aware of a possible threat will be accused, should one materialise of failing in their duty. Governments which warn regularly, but without much happening, will be accused of alarmism - bad advice generating panic at one extreme and apathy at the other'.<sup>99</sup> With such a dichotomy, extensions of powers contained within proposed legislation may require greater evidence and wider discussion on the parliamentary floor. This discussion may be further substantiated with experts offering direction and guidance; a prime opportunity to utilise the findings of the JCHR. In reviewing the influences on justifications for security, three themes emerged as prominent in the justification of moves. These were risk; pre-emptive measures; and the use and availability of evidence. Each of these will now be briefly considered.

### **1.5.1 The Influence of Risk:**

'Risk' is frequently referenced in the restriction of rights and the extension of security and the notion of risk can consequently legitimise the introduction of pre-emptive measures. This has been epitomised in modern anti-terror legislation by the use of control orders in the PTA 2005. Risk, its impact on pre-emptive measures and the influence of intelligence will now be briefly reviewed as a conduit for justification in enhanced security measures as emerged from the case studies examined.

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<sup>97</sup> For a good example of this see the debate undertaken in the House of Commons on clause 23 of the TB 2006. This will be discussed at length later.

<sup>98</sup> Goold, B and Lazarus, L. (2007); Security and Human Rights: the Search for a Language of Reconciliation. Pp. 15.

<sup>99</sup> Freedmen L. (2005); The Politics of Warning: Terrorism and Risk Communication. Pp. 379.

As noted by Beck, 'risk inherently contains the concept of control, further it presumes decision making has to be undertaken. Ultimately when we speak in terms of risk, we are talking about calculating the incalculable'.<sup>100</sup> Nonetheless it has also been suggested that 'if we wait for threats to fully materialise, we will have waited too long'.<sup>101</sup> It is perspectives such as these which instigate precautionary action to be undertaken. Different types of terrorism raise different concerns for risk, warnings and targets. Whilst the UK suffered terror attacks on mainland Britain from the Irish Republican Army (IRA) up until the cease-fire in 1998, the challenge has been documented as significantly different to the threat posed by current international terrorism. There is a strong political affiliation to risk, in line with the justification of security. At the 2005 Labour conference, Mr Blair stressed that trying to fight twenty-first century terrorism with nineteenth century methods was a failure of duty to protect. Further, Mr Blair identified that a complete change of thinking must happen. The IRA targets were political and military, even though some civilian lives were lost, the attacks were not unpredictable and indiscriminate like the attacks of the twenty-first century. As Freedman notes, the warnings given by the IRA allowed them to demonstrate who the attacks were aimed at and, therefore, legislative moves could reflect responses to a clear campaign being pursued. Arguing that the terrorism of Al Qaeda is significantly different, Freedman suggests this is based on the organisation itself who act with no strategy, indiscriminate killing and have the psychological objective of creating terror.<sup>102</sup> The emphasis placed on the 'risk' of twenty-first century terrorism whilst projected through the organisation of Al Qaeda does not, however, subject the UK to a qualitatively different threat to that posed previously by the IRA according to Feldman.<sup>103</sup> Nonetheless, the scenes of 9/11 reverberated around the globe and consequently established themselves as evidence that the risk and threat to the world had changed. Beck suggests that the 'specific characteristics of terrorist threat replaces accident, active trust becomes active mistrust, the context of individual risk is replaced by the concept of systemic risk, the power of definition of experts has been replaced by that of state and intelligence agencies; and the pluralisation of expert rationalities has turned into the simplification of

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<sup>100</sup> Beck, U. (2002); *The Terrorist Threat*. Pp. 41.

<sup>101</sup> Suskind, R. (2006); *The One Percent Doctrine: Deep Inside America Pursuit of its Enemies Since 9/11*. Pp. 149.

<sup>102</sup> Freedman, L. (2005); *The Politics of Warning: Terrorism and Risk Communication*. Pp. 388/390.

<sup>103</sup> Feldman, D. (2006); *Human Rights, Terrorism and Risk: the Roles of Politicians and Judges*. Pp. 368.

enemy images'.<sup>104</sup> This 'terror' or the creation of the 'unknown' arguably leaves no option but to produce vulgar risk assessments, from which infringements on rights may occur.

When politics becomes about fear, and in this instance the fear of the unmanageable risk of international terrorism, the political struggle for existential security 'can become twisted'.<sup>105</sup> Risk, or the notion of risk, permeates the membrane between the political and the public. In its use of language to justify executive motives, the ability to mobilise public support for balance based on personal fears is not an uncommon *modus operandi* of a governing body. YouGov polls have reaffirmed this position on several occasions.<sup>106</sup> According to Beck, what happens in world risk society is that a world of uncontrollable risk is entered and there is not a language to describe what is being faced. The hidden central issue in world risk society is how to gain control over the uncontrollable in politics, law and everyday life.<sup>107</sup> This moves us to consider what then happens when threat assessment is turned into a risk communication? Here, further distortions occur because of the wider purposes of risk communication. The act of communication transfers responsibility for dealing with risk. As Runciman notes, 'should worst case scenarios if they are sufficiently terrible trump all other considerations when politicians have to decide what to do?'<sup>108</sup> This stance, however, does not take seriously enough the downside of getting things wrong.<sup>109</sup> Due to limitations, and because the available information is normally poor, the consequential threat assessments are often speculative.<sup>110</sup> By communicating publically, from a standpoint of vulnerability, Furedi suggests this encourages an attitude of pessimism, dread and foreboding. This is because perceptions of vulnerability have a free-floating character and attach themselves to a wide variety of phenomena encouraging explorations of speculative risk.<sup>111</sup> Consequently, methods for strengthening against vulnerability push precaution to exceed the logic of calculability.<sup>112</sup>

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<sup>104</sup> Beck, U. (2002); *The Terrorist Threat*. Pp. 45.

<sup>105</sup> Sparks, C. (2003); 'Liberalism, Terrorism and the Politics of Fear'. Pp. 201.

<sup>106</sup> The use of these will be examined further in Chapter 6.

<sup>107</sup> Beck, U. (2002); *The Terrorist Threat*. Pp. 41.

<sup>108</sup> Runciman, D. (2004); 'The Precautionary Principle'.

<sup>109</sup> De Goede, M. (2008); *The Politics of Pre-emption and the War on Terror in Europe*. Pp. 177.

<sup>110</sup> Freedmen L. (2006); *The Politics of Warning: Terrorism and Risk Communication*. Pp. 381.

<sup>111</sup> Furedi, F. (2002); *Refusing to be Terrorised: Managing Risk after September 11<sup>th</sup>*. Pp. 13.

<sup>112</sup> O'Malley, P. (2004); *Risk, Uncertainty and Government*. Pp. 5.

Nonetheless, whilst the public may be in support of executive measures based on the notion of 'risk and threat', it has been demonstrated that parliament may not be as receptive as the public. Justifications based on public support have often been challenged by parliament's duty to perform the job it was elected to do; it was not elected to 'listen to the tabloids'.<sup>113</sup> As Bigo notes 'worst case scenarios are never certain and are so often nearly zero in probability that to give them priority at the level of public policy is to be driven by nightmares and fears, not by rationality'.<sup>114</sup> Even so, the notions of risk and threat were utilised by the executive throughout the debate examined to support the need and rationale for moves.<sup>115</sup>

An associated factor in prescribing the use of risk is the use of 'emergency'. 'Emergency' is a direct means of response which leaves no time for analysis, forecasting, or prevention. Binde suggests that 'it is an immediate protective reflex rather than a sober quest for long-term solutions. It neglects the fact that situations have to be put in perspective and that future events need to be anticipated'.<sup>116</sup> As such, risk based on international terrorism which has created an emergency allows governments to dictate rhetoric surrounding necessity for moves. Reviewing risk in line with the current situation, Bigo suggests that if a new kind of terrorism is being faced<sup>117</sup> then the framing of new boundaries between law and politics, between executive and judicial powers, between military and civilian rules, between security and liberty, is legitimate. If a new kind of terrorism on this scale is not being faced then existing solutions and legislation should be reviewed before establishing an exceptional moment.<sup>118</sup> This is, then, when reliance on the impact of 'risk' is disseminated into a demonstration of proof, accountability and justification for moves. While risk alone may be enough to satisfy the public, the potential hiatus caused by pre-emptive measures on individuals requires stringent examination for necessity of moves.

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<sup>113</sup> See HC Vol. 439, Col 360/361, D. Winnick; HC Vol. 438, Col 366/367, D. Hogg.

<sup>114</sup> Bigo, D and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 117.

<sup>115</sup> This draws closer to the practical issues associated with the ability to balance based on the constitutional, democratically elected considerations. This will be addressed further in the following chapter.

<sup>116</sup> Binde, J. (2000); *Towards an Ethic of the Future*. Pp. 52.

<sup>117</sup> 'Which is different in its radicalism and its use of weapons of mass destruction without any warning or discussion because the ultimate goal is destruction and not negotiation of any kind, and is different from the past'. Bigo, D and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 108.

<sup>118</sup> Bigo, D and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 108.



The uncertainty and indiscriminate nature of terrorist attacks render conventional risk assessment techniques inadequate as standalone assessments. However, it subsequently moves to incorporate this uncertainty into policymaking as a basis for pre-emptive action. Suskind has called this the 'one percent doctrine' or the 'security paradigm'.<sup>119</sup> It states that nations should act to pre-empt security threats even if there is only a one percent chance of a particular threat coming to fruition.<sup>120</sup> This moves on to consider the use of pre-emptive measures as a result of risk.

### **1.5.2 The use of pre-emptive measures as a result of risk:**

Experts agree that there are two types of counter terrorist initiatives,<sup>121</sup> deterrence based and pre-emptive based. Harcourt notes that whilst police deterrence aims to prevent or block the success of a terrorist attack and reduce the likelihood that an attack will cause injuries, pre-emptive policy aims to dismantle terrorist organisations.<sup>122</sup> With the emergence of a 'new threat', pre-emptive policy has become a driving force in anti-terror legislation.

Pre-emptive legislation has both supporters and critics. While some worry that anti-terrorism legislation containing pre-emptive measures cuts across different laws,<sup>123</sup> others argue for extending existing law in times of insecurity. The rationale for this extension based on the observation that 'the State is an artificial entity created for the purpose of securing its citizens';<sup>124</sup> demonstrates how this type of measure favours the notion of collective security.

Debate exists as to whether pre-punishment as a result of pre-emptive measures is justifiable. One school of thought implies that if the evidence is strong enough to suggest that an individual is about to commit a crime that person, according to Statman, is 'pre-deserving' of punishment.<sup>125</sup> The other school of thought as presented by Smilansky, is that even with such evidence as a democratic society we must respect the individual as a moral

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<sup>119</sup> Suskind, R. (2006); *The One Percent Doctrine: Deep inside America Pursuit of its Enemies Since 9/11*.

<sup>120</sup> De Goede, M. (2008); *The Politics of Pre-Emption and the War on Terror in Europe*. Pp. 164.

<sup>121</sup> See Faria, J. (2006); *Terrorist Innovations and Anti-Terrorist Policies*.

<sup>122</sup> Harcourt, B. (2007); *Muslim Profiles post 9/11: is Racial Profiling an Effective Counter-Terrorist Measure and does it violate the Right to be free from Discrimination?* Pp. 81.

<sup>123</sup> Roach, K. (2007); *Sources and Trends in Post 9/11 Anti-Terrorism Laws*. Pp. 229.

<sup>124</sup> Wallerstein, S. (2007); *The State's Duty of Self-Defence*. Pp.280.

<sup>125</sup> Statman, D. (1997); *The Time to Punish and the Problem of Moral Luck*. Pp. 129-135.

agent with the integrity to walk away from the anticipated crime.<sup>126</sup> As Zedner notes, if security is a precondition of freedom in the absence of imminent harm it is not logical 'to license measures that are liberty-denying'.<sup>127</sup> So where does the trigger lie for inducing pre-emptive actions, and additionally, how is pre-emptive action administered as a result of this?

As Zedner notes, the impulse towards a pre-emptive response or 'radical prevention' in the case of prospective danger is at some level understandable. It is this rationale for such a manoeuvre, however, which validates the acceptability of moves for Zedner. Actuarial justice is the means by which 'high-risk populations are identified, classified, and contained. It is questionable whether this is driven principally by the demand for security or rather by the very possibility of calculation'.<sup>128</sup> The personification of risk or threat can foster the use of such methods as the precautionary principle. As a guiding framework for public decision-making, the precautionary principle is only now beginning to influence thinking about the risks of crime and terrorism. It requires that where there is a threat of serious harm, 'lack of full scientific certainty' should not be used as a reason for inaction'.<sup>129</sup> This position proposed by Zedner operates on a similar principle to that earlier established in the one percent theory proposed by Suskind.<sup>130</sup>

Legislative moves in the UK may also be influenced by the developments in European and international policy. It is well established that preventative measures are supported within the European framework with Sunstein noting that the precautionary principle is a 'central plank' of EU policy.<sup>131</sup> De Goede identifies that the EU strategy articulates a security environment beset by radical 'new threats' that render the 'traditional concept of self-defence' obsolete.<sup>132</sup> This implies 'that we should be ready to act before a crisis occurs.

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<sup>126</sup> Smilansky, S. (1994); 'The Time to Punish'. Pp. 52.

<sup>127</sup> Zedner, L. (2007); *Seeking Security by Eroding Rights*. Pp. 271.

<sup>128</sup> *Ibid.* Pp. 260.

<sup>129</sup> *Ibid.* Pp. 261.

<sup>130</sup> Suskind, R. (2006); *The One Percent Doctrine: Deep inside America Pursuit of its Enemies Since 9/11*. Pp. 166.

<sup>131</sup> Sunstein, C. (2003); *Beyond the Precautionary Principle*. Pp. 1005-1008.

<sup>132</sup> European Security Strategy. (2003); *A Secure Europe in a Better World*. Pp. 5.

Conflict prevention and threat prevention cannot start too early'.<sup>133</sup> Such interpretations as this present a strong indicator for the use of pre-emptive measures pursued by the state.

Outside of Europe and on the international scene, security measures found in resolution 1267 and 1373 obligate all UN member states to freeze assets of individuals and organisations listed by any other member state on the basis of alleged ties to terrorist groups.<sup>134</sup> Measures such as these then become embedded in anti-terror legislation and can be used to orchestrate support for 'pre-emptive' measures even if they fall outside of the context of the SCR. With such influential external measures, it is unsurprising that the executive interpret their pre-emptive actions and measures as legitimate.

Each of the Bills reviewed included pre-emptive measures. Indeed, each of the case studies is associated with pre-emptive measures in some way, with control orders being a particularly clear example. However, when risk is presented and pre-emptive measures proposed, the significance of intelligence is called into play, both as a precursor to risk and as a justification for pre-emptive action.

### **1.5.3 The influence of Intelligence:**

When looking to determine the necessity and justification of risk and pre-emptive actions, the importance of intelligence cannot be overlooked. Risk and threat should be grounded in intelligence. Obtaining 'good' intelligence is the most effective way to prevent, or pre-empt, acts of terrorism. Since 'surprise is the cornerstone of successful terrorist operations', it is the primary function of the intelligence and security services to detect them and to thereby provide sufficient warning to enable counter operations to be conducted.<sup>135</sup> As Peter Chalk notes, 'current, accurate secret intelligence is indispensable for the prevention or pre-emption of terrorist activities'.<sup>136</sup> The problem is that evidence is often omitted from discussion and deliberation at various levels and in some instances even from the suspect. Whilst intelligence is fundamental to the preservation of life against modern day terrorism, the lack of intelligence based evidence fails to convince critics of the threat, risk, necessity, or the benefit of extending powers.

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<sup>133</sup> De Goede, M. (2008); *The Politics of Pre-Emption and the War on Terror in Europe*. Pp. 168.

<sup>134</sup> Fitzpatrick, J. (2003); *Speaking Law to Power: The War against Terrorism and Human Rights*. Pp. 260.

<sup>135</sup> Wardlaw, G. (1982); *Political Terrorism: Theory, Tactics and Counter-Measures*. Pp. 135.

<sup>136</sup> Chalk, P. (1995); 'The Liberal Democratic Response to Terrorism'. Pp. 27.

Where intelligence is available for review, the influence of risk becomes a staple part of the assessment process. With risk and vulnerability presented, emphasis relies on evidence supplied by the executive to articulate proof and accountability. The framework of accountability is therefore dictated by the executive, and the select few, privy to information. The transparency of moves has begun to play an integral role in the checks and balances process following events such as the WMD fiasco and the Hutton enquiry. Needless to say, accountability emerged as a leading theme in the debate examined and particularly as the driving factor on 90 day pre-charge detention.<sup>137</sup>

Risk, pre-emptive response and intelligence all form part of the justificatory framework for security. Whilst each is dependent on the other to provide a substantive case, quite often in debate the links were not formatted into a cohesive chain of reasoning as such debate jumped significantly from one aspect of discussion to another, with limited exposure to themes, trends, consistency and even previously established principles within the debate. Indeed each of the themes examined thus far also incorporates constitutional principles in the relationship between parliament, the government and the judiciary. As such, this will be examined further in the following chapter. Aside from constitutional influence, each of these themes helps feed into the widely examined debate of the existence, emergence or quest for balance. Although the themes examined are not exclusively aligned with the balance debate, they help establish how influences in the current debate may be informed. The following examination will now address the balance debate as established in light of rights and security measures. As with the previous examinations, this is not exhaustive however it aims to provide a subtle backdrop for a review of the quantitative and qualitative examinations.

Accepting these boundaries it is arguable that, as with many other uncertainties captured within this debate, these influences on justifications of security create a further layer in the balance debate by incubating two competing risks; the risk from an attack competing against the risk to individual rights. Whilst these risks can be marginalised (with some known influences such as which rights may be infringed) the real assessment remains in 'calculating the incalculable'.<sup>138</sup> As with the examination undertaken to establish whether a balance

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<sup>137</sup> Discussion of accountability will be further advanced in Chapter Two.

<sup>138</sup> Beck, U. (2002); *The Terrorist Threat*. Pp. 41.

between rights and security exists, in practical terms, the process of weighing up contributory factors occurs much less explicitly at various junctures of debate dependant on how the information is filtered through committees and parliamentary discussion.

Now that both rights and security have been reviewed, it is important to address the conceptual issue of balance. This review is made in line with security and rights balance as opposed to the practical issues of where the balance is made or should be made.

### **1.6 The quest for balance in current settings:**

Should human rights always 'trump' the protection of national security? Rights are generally not absolute as in some instances they can be rescinded or modified for the protection of national security.<sup>139</sup> It is this rationale which leads Golder and Williams to assert that a balancing approach is the 'proper' method for assessing anti-terror law.<sup>140</sup> In this balance, the importance of the relevant human right is weighed against the importance of the societal or community interest in deciding whether to take legislative action (or, from the position of a judge, in deciding whether a certain law is valid).

If certain human rights can be derogated from, and in this case as a response to security measures, then the question must be raised of the most appropriate method of balancing. For Golder and Williams 'balancing' appears to be simply another metaphor or standard, such as 'reasonableness', 'necessity' and 'proportionality', subsuming crucial policy decisions beneath a vague concept of uncertain, and malleable, content. As a result of this it says nothing about which rights or interests are to be balanced or what concepts are to guide the decision maker in their attempt to balance.<sup>141</sup> If this subjectivity is to be taken in line with arriving at a reasonable and justifiable answer, how can the problems manifested with the concept of balance be minimised and, further, is balance the correct protocol to employ?

Publically, it is assumed that we are living amidst a conflict between rights and security. In 2005 the British Prime Minister, Tony Blair, stated that the 'rules of the game' must change

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<sup>139</sup> As an example, Article 3 ECHR demonstrates an exception to this.

<sup>140</sup> Golder, B and Williams, G. (2006); *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*. Pp. 44.

<sup>141</sup> *Ibid.* Pp. 53.

whilst the Home Secretary expressed that the ECHR was established over 50 years ago in a quite different international climate and was now being used in an ‘outdated and unbalanced’ way’ by rights advocates.<sup>142</sup> Interpretations and comments such as these indicate, particularly through the eyes of the executive, that security and rights are competing. There is also a suggestion that there is a *requirement* to balance the two concepts, that is, that security and rights are not as rigidly defined as previously experienced. As such the presentation of ‘exceptional’ circumstance necessitates the re-evaluation of the self-indulgence of individual rights and liberties.<sup>143</sup> As Ignatieff notes, ‘the belief that our existing rights and guarantees should never be suspended is a piece of moral perfectionism’;<sup>144</sup> a principle established earlier by Dworkin,<sup>145</sup> Waldron<sup>146</sup> and Hart<sup>147</sup> et al. This claim by Ignatieff reiterates the inescapable tension caused by the competing balance of rights and security. In conflict with the position of Golder and Williams, Waldron argues that to secure a justifiable outcome should not have to rely on the goal based logic of a ‘balance metaphor’.<sup>148</sup> Whatever view is adopted, suggestions point to the need for some form of weighing up to take place.

It is clear that there is a political value to balancing rights with security. Ashworth identifies two theories which address this balance; firstly the ‘fundamental contradiction thesis’, a pro rights argument; secondly the ‘balanced response thesis’ which articulates that governments must strike a balance between the dilemma of security and rights. Embedded within the fundamental contradiction thesis lies the belief that to undermine rights similar to those encountered by terrorist actions, governments are acting in the same way and are in some respects ‘colluding with the terrorists’. Many supporters of this thesis believe that ‘if there is to be a ‘fight against terror’, it should be a fight for human rights and for the rule of law’,<sup>149</sup> a position evident within the debate on anti-terrorism legislation.<sup>150</sup> This latter

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<sup>142</sup> Ashworth, A. (2007); *Security, Terrorism and the Value of Human Rights*. Pp. 203.

<sup>143</sup> It has already been noted that much of the debate on the ‘exceptional’ in the balance of national security and human rights emerged from the events of 9/11. It has been noted however that this was not the first reliance on ‘exceptional’ circumstance but merely the event that brought such a concept into populist culture.

<sup>144</sup> Ignatieff, M. (2004); *The Lesser Evil: Politics in an Age of Terror*. Pp. vii.

<sup>145</sup> Dworkin, R. (1984); *Rights as Trumps*.

<sup>146</sup> Waldron, J. (1984); *Theories of Rights*.

<sup>147</sup> Hart, H. (1984); *Are there any Natural Rights?*

<sup>148</sup> Waldron, J. (2003); ‘Security and Liberty: The Image of Balance’. Pp. 191-210.

<sup>149</sup> Ashworth, A. (2007); *Security, Terrorism and the Value of Human Rights*. Pp. 206.

<sup>150</sup> See HC Vol. 418, Col. 371: Mr. R. Marshall-Andrews.

position is supported by Hoffman who claims that the war on terror undermines our security more than any terrorist bombing, suggesting further that history has shown that when societies trade rights for security most often they get neither.<sup>151</sup> Opposite to the fundamental contradiction theory is the balanced response thesis. This presents that to fight terrorism adequately the curtailing of rights is necessary. Ashworth notes that this theory appears to assume a 'hydraulic relationship between rights and security'.<sup>152</sup> As a result of this 'hydraulic' nature, Ashworth argues that public interest does not include protecting fundamental rights, arguing further that 'the term 'balance' tends to disarm opponents because it has no tenable antithesis: nobody, that is, would stand up and argue for imbalance or indeed for disproportionality, unreasonableness or unfairness'.<sup>153</sup> What these interpretations reaffirm is that the balance of rights and security is, as expected, an unpredictable process.<sup>154</sup> Additionally, in many interpretations, these concepts often compete although they are not necessarily incompatible. It is, consequently, not surprising that such complications are witnessed in the debate by politicians.

As has been seen, there are significant variations and interpretations of how both rights and security are viewed. It is these variations that pressurise legal frameworks when justifying legislative moves. However this is viewed, rhetoric and interpretation are crucial in the understanding of this debate. Post 9/11, it would appear that the 'balance' between security and rights has become inseparable.<sup>155</sup> This perceived 'inseparability' is a fundamental review point in this thesis through anti-terror legislation.<sup>156</sup> The internationalisation of terrorism has driven forward the perceived need for extended control powers by the government. This is reinforced by the state's ability to monopolise coercion. This need for 'control' has normalised infringement on rights and liberties underpinned by the UK's derogation from the ECHR. Such a view demonstrates prioritisation between rights, freedoms and security and requires that the concept of balance itself receives close scrutiny. In particular, moves often drift towards a 'balance' that involves

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<sup>151</sup> Hoffman, P. (2004); Human Rights and Terrorism. Pp. 933-934.

<sup>152</sup> Ashworth, A. (2007); Security, Terrorism and the Value of Human Rights. Pp. 208.

<sup>153</sup> Ibid. Pp. 208.

<sup>154</sup> Bronitt observes, that it is a mistake to assume that 'crime control and due process stand in an inverse hydraulic relationship in which measures designed to enhance crime control will necessarily diminish due process, and vice versa'. Bronitt, S. (2003); Constitutional Rhetoric v. Criminal Justice Realities: Unbalanced Responses to Terrorism? Pp. 69.

<sup>155</sup> Waldron, J. (2003); 'Security and Liberty: the Image of Balance'. Pp. 191.

<sup>156</sup> This excludes terrorism legislation that was introduced specifically for Northern Ireland.

restricting rights of a small minority<sup>157</sup> in the hope of enhancing the security of the majority. Another flaw in this position is that the resulting curtailment may have an unintended effect, notably that of expanding the powers of the state so as to augment another threat to security.<sup>158</sup> This was a core argument in the debates examined, and was evidenced by the impact which internment had on generating support for the IRA during the 'Troubles' in Northern Ireland.<sup>159</sup>

Looking at balance between security and rights however, particularly in a balance metaphor scenario, requires questioning of what tips this balance, in whose interests and what lies within the scales of balance? When reviewing how to reconcile security and rights this also encompasses other balances, all of which feed into the overall security and rights debate. These include balancing between the 'individual and the collective, between the political and the legal and between political sovereignty and the rule of law'<sup>160</sup> to name but a few. Only when it is established how this balance is made is it then possible to question what should then be done when rights are in conflict.<sup>161</sup> The problem this presents is that no formula exists. Each school of thought will dictate its own interpretation which may or may not be significantly different to others. To establish this emphasis it must be accepted that, at least politically, the balance metaphor exists.

So how is balance arrived at? National security/emergency are both emotive phrases which, compounded with visual evidence and catastrophic scenes, can be very powerful; however, can rhetoric be powerful enough to overshadow long established rights and constitutional principles? How does a government prove that a restriction on rights will provide for increased security; a concern raised by Mr Khan in 2006 when examining the implications of

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<sup>157</sup> It is important to note that the use of the term 'minority' throughout this research does not represent a particular group, creed, culture or religion. Minority is the term used to denote individual terror suspects whose rights or interests may be infringed in the perceived protection of collective or majority rights or interests. Considerable work has been carried out however reflecting the impact of anti-terror legislation on 'minority groups' such as the Muslim community. For a review of this material see: Fekete, L. (2004); *Anti-Muslim Racism and the European Security State*.

<sup>158</sup> Ashworth, A. (2007); *Security, Terrorism and the Value of Human Rights*. Pp. 209. See further Waldron *The Image of Balance*.

<sup>159</sup> This particular position gathers speed throughout debate at various junctures with continued emphasis on the experience from Northern Ireland.

<sup>160</sup> Gould, B and Lazarus, L. (2007); *Security and Human Rights: the Search for a Language of Reconciliation*. Pp. 7.

<sup>161</sup> Zedner, L. (2005); *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*. Pp. 509.



the TA 2006.<sup>162</sup> As previously established, in justifying security measures the executive should demonstrate a number of external factors, including risk and threat, to legitimately pursue the intended objective. This however has led to political struggles mounted by the opposition in a bid to identify how these two social goods compare to one another. Loader suggests that in this balance between social goods it is easier for 'political, professional and media actors' to 'mobilise a populist appeal to the idea of security'; a concept alluded to earlier.<sup>163</sup> This in itself requires consideration of what the influence of populist support is and whether it can validate the political integrity of decision making on behalf of the electorate. These influences will hopefully be extrapolated throughout the analysis of each case study.

An act of terrorism offers society a means to reaffirm human bonds that have been eroded. Emergencies take on a different role depending upon what they represent to particular societies, at particular times, rather than based on objective indicators such as real cost and real lives.<sup>164</sup> Accordingly, terrorism can be used as a tool to orchestrate change, asking the question of what governments accrue from such extension of power. An emotive agenda is no more clearly demonstrated than by the language used to generate a sense of fear. The supposed novelty of terrorism and threat in current years has been exaggerated by the radicalisation of the ideology and language of war. This language of war mobilises the population by demonising the evil enemy. Coercive measures, specifically excluded by rights obligations on an individual level are acceptable in the name of protecting the freedom and rights of the collectivity. As already seen, these measures are supported with the use of YouGov polls by the executive. Bigo suggests that 'the issue of a right to sacrifice individual rights in the name of collective security and freedom arises only if we are living in an exceptional moment'.<sup>165</sup> The question still remains, however, as to what constitutes an 'exceptional moment'.

Ashworth identifies that the process of balancing or 'trading off' various alternatives to achieve the best result is difficult. For Ashworth, this is because not only does this 'trading off' involve assigning weights to different rights, but also to ascertaining the levels of

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<sup>162</sup> HC Vol. 438, Col 363/364 S. Khan; HC Vol. 438, Col 906 S. Khan.

<sup>163</sup> Loader, I. (2007); *The Cultural Lives of Security and Rights*; Pp. 28.

<sup>164</sup> Durodie, B. (2005); *Terrorism and Community Resilience – A UK Perspective*. Pp. 4.

<sup>165</sup> Bigo, D and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 108/110.

confidence in predictions of consequences. Ultimately, both of these alternatives are likely not only to be highly contestable, but further, require a comparison of the weight of certain rights against certain consequences.<sup>166</sup> How these comparisons are made is dependent on the tools relied upon to justify the so called 'trade off'. Whilst against the backdrop of mass casualties and threat some express that 'security should outweigh rights, that we should not be left wondering what would be the next phase' while others maintain that constitutional heritage, democratic validity and the rule of law demand 'rational' and 'provable' actions.<sup>167</sup> This is a split clearly identified in debate. This reiterates the necessity for governments to provide transparent justification for measures presented thus satisfying requirements of necessity and proportionality.

Following their examination into balancing rights and security, Golder and Williams suggest guidelines for constructively weighing rights and security when balancing. Their aim is to give content, structure and direction to what is an imprecise task. First, when balancing it is identified that it has to be recognised that some rights are more important than others. As such, this should be a contributory factor in the weighing up and balancing of security and rights. The second guideline suggested is that, if the decision maker is required to balance the importance of a non-fundamental right against national security, the decision maker should require the most cogent empirical evidence available that the proposed means of achieving the goal, national security, will actually be effective. This however is not without its limitations.<sup>168</sup> Thirdly, for Golder and Williams, if the desired goal of national security can be achieved through means which do not derogate from human rights, or which do so to a lesser extent, then that is the legislative course which should be adopted.<sup>169</sup> Finally, when

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<sup>166</sup> Ashworth, A. (2007); *Security, Terrorism and the Value of Human Rights*. Pp. 210.

<sup>167</sup> Newman, D. (2003); *September 11: A Societal Reaction Perspective*. Pp. 223.

<sup>168</sup> This rule of balancing requires the decision maker to justify the derogation of human rights by reference to a demonstrated link between the means... Requiring a government to prove such a causal link may well be asking too much. Additionally, secrecy imperatives in the context of counter-terrorism may preclude the possibility of adducing evidence about, for example, the number of attempted terrorist attacks pre-empted or intercepted by security agencies since the enactment of an Act. Nevertheless, the impossibility of definitively linking the cause and effect of counter-terrorism legislation should not absolve government from the obligation to account for the negative effects of their legislation, nor from the obligation to forecast the likely practical results of a course of action.

<sup>169</sup> This concept of proportionality requires the legislator or policy maker to consider and evaluate alternative means. If they do not do so, this may be another reason for the law to be struck down by a court... This rule of balancing may also require that legislation contain a "sunset clause" to bring the operation of the legislation to an end upon the expiry of a set period of time. If it cannot again be demonstrated at the end of this period that

looking at the simplicity of rights and security balance it should not be glossed over that in fact the balancing process can be racially, and religiously, unbalanced a position clearly documented as emerging from Part 4 ATCSA 2001.<sup>170</sup> There is no explicit use of these guidelines publically or politically but they do identify a checklist which could be used as a tool when examining the necessity of a balancing process. It also indicates, however, that there must be prior knowledge and preparation to know whether existing legislation could achieve the objectives required by the balance being discussed. Importantly, wider social implications should not be overlooked. This process clearly involves a much wider obligation than simply one that parliament alone can offer.

Aside from parliament, in applying human rights, judicial bodies have recognised the need to weigh rights against other concerns such as national security. This reaffirms that there is a wider balancing process to consider. The need to weigh rights against other non-rights interests is also inherent in general concepts of the nature of human rights.<sup>171</sup> It is therefore crucial to articulate what is meant by balancing, what interests are being balanced, and whether balancing is a sufficiently precise and descriptive metaphor for what we are seeking to achieve in legal and policy terms.<sup>172</sup>

### **Concluding remarks:**

There are a number of overarching issues when analysing anti-terrorism legislation, the primary being the perceived balance or trade-off between rights and security.<sup>173</sup> Zedner believes that 'a sympathetic, though hardly benign, interpretation is that the British Government has found itself bound to uphold human rights at precisely the historic moment when world events and public opinion seemed to call for a sacrificing of individual freedoms in the name of collective security'.<sup>174</sup> As Kellner notes 9/11 was so far-reaching and catastrophic that it flipped the political world upside down, put new issues on the agenda and changed the political, cultural, and economic climate almost completely

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the legislation has achieved and will continue to achieve the goal of safeguarding the community, it should not be re-enacted.

<sup>170</sup> Golder, B and Williams, G. (2006); *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*. Pp. 54-57.

<sup>171</sup> Henkin, L. (1990); *The Age of Rights*. Pp. 4.

<sup>172</sup> Golder, B and Williams, G. (2006); *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*. Pp. 50.

<sup>173</sup> The influence and impact of balance will be examined later in this chapter.

<sup>174</sup> Zedner, L. (2007) *Seeking Security by Eroding Rights*. Pp. 267.

overnight. More importantly the attacks demonstrated a vulnerability to terrorism. Ultimately this new vulnerability identified that technology such as airplanes or the internet, could be weapons of destruction and could threaten anywhere and anytime.<sup>175</sup> Although rights are established, as Waldron notes, it is their interpretation which leaves the politically delicate nature of rights in the balance.<sup>176</sup> It cannot therefore be denied that such a wide margin of appreciation on all concepts influential in the balance debate demonstrate both the vulnerability of parliamentary debate on challenging legislation, but also implementation of legislation by the judiciary following its enactment. The concept of rights (whether to security or freedom) is 'flexible rather than stable, fragmented rather than unitary and fuzzy rather than determinant. It belongs to the symbolic order of language and law which determines the scope and reach of rights with scant regard for ontologically solid categories'.<sup>177</sup>

When action is taken by governments to reduce threat from the unpredictable measures employed by terrorists, the impingement on rights has often been spoken of in terms of balance. We must balance our rights with our security. This approach, however, has been considered both as misleading and unhelpful. Freedom cannot be guaranteed by a reduction in rights ascertained through a simple balance process. Stone suggests that 'necessity' rather than 'balance' should be used. Ultimately, given the threats, it is suggested that it would be beneficial to consider the minimum steps necessary to respond effectively. Individual rights should only be restricted when the need exists and is real therefore it should not simply be when it might be regarded as helpful to extend powers.<sup>178</sup> However, as established, the cost of getting the balance wrong may be a contributory factor in the inability to separate the emotive from the political, and as such, operates on the assertion that the notion of security is so powerful that it can 'trump' all other considerations.<sup>179</sup>

With all this taken into consideration, including an understanding of the real impact draconian moves may have delivered through a balance process, Bigo and Guild identify that to best review this balance is to acknowledge that security and rights appear to be

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<sup>175</sup> Kellner, D. (2002); September 11, Social Theory and Democratic Politics. Pp. 149-152.

<sup>176</sup> Waldron, J. (1984); Theories of Rights. Pp. 15.

<sup>177</sup> Douzinas, C. (2000); The End of Human Rights. Pp. 254.

<sup>178</sup> Stone, R. (2006); Police Powers and Human Rights in the Context of Terrorism. Pp. 388.

<sup>179</sup> Zedner, L. (2007); Seeking Security by Eroding Rights. Pp. 257. See further Dworkin, R. (2003); 'Terror and the Attack on Civil Liberties'.

underpinned by two parameters. The first of these is the driving force of the novelty and intensity of the threat. The novelty and intensity of threat will evoke risk assessments, preparation of moves and the consultation on effective measures. The second parameter, acknowledged by Bigo and Guild, is identified by the limits of the exceptional movement; namely its necessity, legality and legitimacy.<sup>180</sup> The effective control of security-focused state action is to be judged on the extent to which it consists only of action that is necessary and proportionate. Arguably, by reviewing the situation within such frameworks an appropriate balance can be struck between security and rights. De Londras believes this commitment to such balanced action is the 'lynchpin of liberal democratic governments'.<sup>181</sup> The existence of these parameters will be extrapolated from the examination in this thesis.

As noted earlier, whilst Cotler<sup>182</sup> and Ruddock<sup>183</sup> suggest that to adopt a positive stance on 'human security' evades the messy and blurred boundary debates associated with balancing, Golder and Williams<sup>184</sup> argue that, at least with the undertaking of a balancing process, the opportunity exists to sift the legislation and open avenues for challenge. This challenge, however, must be made and it is this, or at least the need for challenge, which emphasises the necessity for discussing the influence of constitutional principles. As previously mentioned, balance does not necessarily fall into the hands of parliament. What is vital is that executive actions must be curtailed when necessary. The manipulation of risk, security, necessity of pre-emptive measures and the clandestine nature of intelligence all feed into the control in the hands of the executive.

Freedman<sup>185</sup> establishes that the threat from current terrorism is 'new', Feldman<sup>186</sup> notes that the end result of this 'new' terrorism is not qualitatively different and therefore does not need such emancipation in anti-terror law. Whichever position is adopted, whether for existing measures or the extension of powers, if balance is not grounded in intelligence or evidence established on real threat but on projected numerical assessments of attacks

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<sup>180</sup> Bigo, D and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 108.

<sup>181</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*. Pp. 20.

<sup>182</sup> Cotler, I. (2001); *Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy*.

<sup>183</sup> Ruddock, P. (2004); *Australia's Legislative Response to the on-going Threat of Terrorism*.

<sup>184</sup> Golder, B and Williams, G. (2006); *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*.

<sup>185</sup> Freedman, L. (2002); *A New Type of War*.

<sup>186</sup> Feldman, D. (2006); *Human Rights, Terrorism and Risk: the Roles of Politicians and Judges*.

rights may be unnecessarily corroded. This is where the constitutional roles performed by parliament, and supplemented in some cases by the judiciary, must challenge for evidence, proof and accountability through the methods available with checks and balances. Terrorism, however, continues to present symptoms of the 'knowable versus the unknowable'.<sup>187</sup> These approaches continue to place emphasis on the need for security measures to demonstrate why they are encroaching upon rights. This would include an emphasis on risk assessments of actual risk, residual risk and intelligence based threat assessments, all of which have to be substantiated by evidence and most of all accountability demonstrated.

As Zedner notes 'security' is so 'slippery' and 'open textured' it can furnish justification, it is a moving target.<sup>188</sup> As established in the limitations of this study, and further supported by the representations presented in this chapter, individuals can be genuinely committed to rights and yet still differ on philosophical issues such as their scope, whether a particular objective is consistent with the project of protecting rights and whether legislation complies with notions of proportionality.<sup>189</sup> De Londras and Davis establish that 'within a system of separated powers, there are three potential responses to the limitation of individual liberties resulting for executive actions during the times of violent, terrorism related emergency: (1) trust the executive to behave responsibly and lawfully; (2) rely on the legislature and the popular democratic processes to force the executive to behave responsibly and lawfully and minimise judicial interventions; or (3) call on the judiciary to intervene and restrict unlawful behaviour produced by the executive, the parliament or both acting together'.<sup>190</sup> These 'potential responses' identified by De Londras and Davis are important to this research because the response adopted will influence the interpretation of data and ultimately the conclusive findings. Chapter Two will draw on the inferences from this chapter and take them forward, not only in the analysis of 'balance' as a concept but further that balance can only be understood if where the balance lies within the legislative

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<sup>187</sup> Zedner, L. (2005); *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*. Pp. 521.

<sup>188</sup> *Ibid.* Pp. 521.

<sup>189</sup> Hiebert, J. (2006); *Parliament and the Human Rights Act: Can the JCHR help Facilitate a Culture of Rights?* Pp. 11.

<sup>190</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*. Pp. 19.

process is explored. As such, the following chapter reviews the challenges made by the influence of constitutional principles.

# Chapter Two:

## Oversight mechanisms; the performance of balance

When reviewing and coding parliamentary debate it became evident that the assessment of rights and security could not be performed without acknowledging the influence of key constitutional principles, such as the separation of powers. From the quantitative findings, the influence of constitutional principles (in all three anti-terror Bills reviewed) accounted for significant quotas of debate. Whilst the aim of the case studies was not focused on constitutional principles, it cannot go unrecognised that indirect influence from the judiciary exists, in ascertaining the direction and ultimately the balance of measures in the rights/security debate. It is the influence of the judiciary which has led commentators<sup>191</sup> to consider potential competing functions between the executive, the legislature and the judiciary particularly over who is best placed to carry out particular review functions. The aim of this chapter is not to discuss the historical notions of constitutional principles but to review broad principles of scrutiny measures as currently presented by scholars. This will be furthered by discussing the case law relied upon by the executive prior to the enactment of the ATCSA in support of their extensions of power. The case law presented helps demonstrate just how blurred boundaries appear to be, particularly over extensions of power, and reinforces the continued necessity for multi-agency reviews and along with functional and effective oversight mechanisms.

There is no doubt that constitutional principles play a pivotal role in the functioning of the legal system in the UK. From the quantitative findings presented in Chapter Three of this thesis there was sufficient evidence to suggest that constitutional principles were influential, both in the law making process as well as within debate over the functions of oversight mechanisms. Therefore, constitutional principles will be briefly examined here with the intention of examining challenges to executive supremacy by parliament and the judiciary as part of the oversight mechanism framework. This chapter will consequently

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<sup>191</sup> See: De Londras, F and Davis, F. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism; Phillips, M. (2006); Londonistan. How Britain is creating a Terror State Within.



address the influence and mechanisms of scrutiny rather than discussing factors which influence the conceptual balance as discussed in the previous chapter.

## **2.1 Interface of the Government and oversight mechanisms:**

The government proposes legislation but only parliament may enact laws giving legal effect to proposals. It remains noteworthy in this assessment that, where a government has a large majority of seats in the Commons the government has the potential to dominate and ensure that its proposed legislation is enacted. The judiciary, however, must be seen to be politically impartial. The judicial function is to interpret parliament's intentions and to ensure, through judicial review, that any delegated legislation is consistent with the scope of power granted by parliament.<sup>192</sup> The rule of law also requires that judges ensure the legality of government action; a function that could not be fulfilled if the judges' independence was in doubt.

Whilst the judiciary have the ability to interpret legislation, constitutionally they have no power to question the validity of legislation.<sup>193</sup> However, Section 3 of the HRA imposes a duty on judges to interpret legislation 'as far as possible'<sup>194</sup> in a manner to make it compatible with Convention rights. Where this is not possible a 'declaration of incompatibility' can be issued but it cannot declare an Act of Parliament invalid.<sup>195</sup> This inability to declare an Act of Parliament invalid maintains the supremacy of the elected chamber and leaves the opportunity to respond to the declaration of incompatibility in the hands of the executive and the legislature.<sup>196</sup> The importance of the judiciary and the reliance on case law by parliament invites a brief examination of the scope of the interplay between parliament and the judiciary in this volatile debate of oversight mechanisms.

It is accepted that executive actions must be checked and subjected to substantial oversight, even in times of emergency. Historic claims of 'Executive Supremacy', which suggest that the executive is the best placed branch of government to make decisions about how to

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<sup>192</sup> There is further power of review under the HRA.

<sup>193</sup> *Pickin v British Railways Board* [1974]; AC 765.

<sup>194</sup> Section 3 HRA.

<sup>195</sup> This may run contradictory to s.19 declaration of compatibility made by the Executive.

<sup>196</sup> In her review of the JCHR, Klug (2006) found that of the 18 declarations of incompatibility issued by the courts since the HRA came into effect up to the time of writing, 12 were still standing.

manage a risk that threatens security, are unsubstantiated.<sup>197</sup> Such distrust in 'Executive Supremacy' is based on the well documented experience of counter-terrorist law and policy making, which suggests that the executive has a 'security-bias' impacting significantly on individual rights protection.<sup>198</sup> De Londras and Davis, therefore, believe that unchecked executive action has a tendency to over-indulge the necessity of security with insufficient consideration to the infringements that might occur, causing 'disproportionate and unnecessary rights violations'.<sup>199</sup> This criticism is not isolated, but demonstrates that fears remain over executive powers.

It was established in the House of Commons that the government needed to share more information 'with parliament and with society more widely'.<sup>200</sup> However, as well as sharing information, parliament ought to require more from the executive, particularly information on the nature and scale of the threat requiring such extensions of power required to derogation from the ECHR. In a speech in 2006, Gordon Brown referred to the need to 'build public trust in the UK's security regime through accountability to parliament'.<sup>201</sup> Sincere or not, it reiterated the increasing need for transparency in justifications of measures. One concern which continued to arise through the case studies examined was the limited capacity for parliament to scrutinise the evidence relied upon by the executive. Parameters for scrutiny were often framed within the constraint that evidence was so sensitive it could not be shared. This, however, is not a substantive justification to disregard the scrutiny of executive measures. As Dyzenhaus acknowledges, there is a requirement for greater validation of the information that forms the basis of the government's assessment of the threat. Detailed information must be made available for independent scrutiny of what is required in the interests of national security. Assessments of the proportionality of measures can only be made 'if sufficient information is available about the precise nature of the threat'.<sup>202</sup> This places greater emphasis on the remit of parliamentary scrutiny through

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<sup>197</sup> For example see: Lustgarten, L. (2004); National Security, Terrorism and Constitutional Balance.

<sup>198</sup> See Bonner, D. (2008); Have the Rules of the Game Changed? De Londras & Davis. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism; Davis, F. (2012); Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK.

<sup>199</sup> De Londras and Davis. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism. Pp. 21.

<sup>200</sup> HC Vol. 442, Col. 485; C. Clarke.

<sup>201</sup> 'Securing our Future', (13/02/2006); Speech Chancellor G. Brown MP.

<sup>202</sup> Dyzenhaus, D. (2007); Deference, Security and Human Rights. Pp. 146-151.

committees, such as the JCHR.<sup>203</sup> With the specific task of human rights scrutiny it is anticipated that, of the parliamentary committees, the JCHR should become the lynchpin of investigative debate and ultimately provide matters of debate to challenge legislation when necessary.

While the judiciary have a duty to scrutinise executive rationale, it must also be established that moves ‘satisfy basic standards of rationality and are not inconsistent with the principles that underpin democracy’.<sup>204</sup> The judiciary should also display rationality in the decisions they make.<sup>205</sup> This, in some instances, may mean offering submissive deference and submitting to the intention of the legislation, deferring to the decision maker unless straying beyond the limits of statutory authority.<sup>206</sup> Dyzenhaus notes that a number of other factors can also contribute to the scope of deference including

‘the nature of the right in question; the relative expertise of the court and the decision maker in the subject matter in question; the relative institutional competence of the original decision maker to determine the type of issue in question; the degree of democratic accountability of the original decision maker; how well democratic mechanisms are working in practice; the extent to which the decision or measures were preceded by a thorough compatibility inquiry; and the opportunities afforded in the process, or through other accountability mechanisms, to the interests affected’.<sup>207</sup>

It is, therefore, not necessarily a conflict of constitutional principles to defer to the executive and the legislator. However, to fail in a duty to justify deference and provide the scrutiny the oversight mechanism facilitates, could undermine long established checks and balances.

It has been recognised that to allow ‘Executive Supremacy’ to go unchallenged is counter intuitive to the functions of the oversight mechanisms. As identified in the previous chapter, two limiting processes can be employed to provide checks; firstly, the function of parliament and public democracy and, secondly, the intervention of the judiciary in the protection of

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<sup>203</sup> The role of the JCHR will be considered in greater depth later in this chapter.

<sup>204</sup> Dyzenhaus, D. (2007); *Deference, Security and Human Rights*. Pp. 131.

<sup>205</sup> The role of the judiciary, deference and the influence of the HRA will be discussed later in this chapter.

<sup>206</sup> See Lustgarten, L. (2004); *National Security, Terrorism and Constitutional Balance*. Pp. 10.

<sup>207</sup> Dyzenhaus, D. (2007); *Deference, Security and Human Rights*. Pp. 139.

rights. Each of these checks has its own limitations yet both offer legitimate means of challenging the power of the executive if, and when, necessary. This, however, is not to say that each process has to work independently. This review aims to examine the potential influence each process has in the checks and balances role it has historically performed. The first process to be reviewed is parliamentary scrutiny.

## **2.2 Parliamentary scrutiny:**

Having established that the power of the executive must not go unchecked in the name of providing a legitimate balancing procedure, assessment turns to operational methods which can perform such a role. Davis contends that the judiciary is an ineffective means of controlling the executive. This claim is based on the judiciary's historic unwillingness to interfere and, although recent case law may be encouraging, it is no indication of future performance. More importantly, by thinking that the courts will fulfil this crucial function, Davis argues that we anaesthetise constitutional actors who might exercise genuinely effective control, namely 'the legislature and the people acting in their constitutional capacity' through popular democracy.<sup>208</sup> In the white paper 'Rights Brought Home: The Human Rights Bill' the government indicated that 'parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy'.<sup>209</sup> Identifying four conditions necessary for parliamentary scrutiny specific to rights and security to be useful and effective, Feldman remarks that parliament should 'take human rights seriously; should recognise their own limitations; should recognise the corresponding strengths of other institutions; and should be prepared to read, reflect on and use the reports of committees when deliberating and voting'.<sup>210</sup> As will be seen from the case studies examined later, regarding these points noted by Feldman for the effectiveness of parliamentary scrutiny, findings reflect that the majority of these criteria are not expressly observed by parliament.<sup>211</sup>

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<sup>208</sup> Davis, F. (2006); 'Extra-Constitutionalism, the Human Rights Act and the 'Labour Rebels': Applying Prof Tushnet's Theories in the UK'.

<sup>209</sup> Rights Brought Home: The Human Rights Bill. (1997); Para 3.6.

<sup>210</sup> Feldman, D. (2006); The Role of Parliaments in Protecting Human Rights: A View from the UK. Pp. 15-17.

<sup>211</sup> The work of Hunt, M, Hooper, H, and Yowell, P; will be acknowledged later in this chapter. This will reflect on the relationship between parliament and the JCHR. The work of Klug and Wildbore will also examine this particular relationship.

In theory parliament can legislate, scrutinise and conduct enquiries probing for answers from government on the rationale of positions adopted and improving the quality of policy. More importantly, such scrutiny commands transparency in the work of the government and, therefore, strengthens representative democracy. As Shephard notes, perspectives on how influential parliament is depend upon the lens adopted, the functions evaluated and the policies and associated political context.<sup>212</sup> Evans and Evans acknowledge that legislatures perform several distinct functions<sup>213</sup> including being representative bodies who provide the mechanism by which citizens participate in public affairs; they provide a forum in which governments can be held accountable; and they are considered to be deliberative law-making bodies.<sup>214</sup> Scrutiny through popular oversight, whether through parliament or 'the people' is, according to Davis, to be preferred to judicial oversight in times of security-related crisis. This is based on its capacity to nudge government towards a more balanced counter-terrorist policy than can be achieved through the courts. This, for Davis, is because 'the people' through parliament are capable of promoting a rights argument.<sup>215</sup>

Curbing of executive measures can potentially be achieved through parliamentary rebellion (individual parliamentarians breaking ranks with the government).<sup>216</sup> Shephard notes that this method of challenge works effectively as a policy influencing institution rather than a policy making process.<sup>217</sup> Parliamentary rebellion is rare because of the cost in a system of political parties, although parliamentarians are more likely to rebel after the mood in the country has already changed. As De Londras identifies, supporting an already popular movement is likely to be popular with the electorate thereby increasing the chances of electoral success.<sup>218</sup> This was seen in the Blair administration of 2005. Shephard argues that following the 2005 election, the obvious loss of public trust in Prime Minister Blair led to 'a

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<sup>212</sup> Shephard, M. (2009); *Parliamentary Scrutiny and Oversight of the British 'War on Terror': From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions*. Pp. 191.

<sup>213</sup> These functions are based on established democratic States.

<sup>214</sup> Evans, C and Evans S. (2006); *Evaluating the Human Rights Performance of Legislatures*. Pp. 548.

<sup>215</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*. Pp. 31.

<sup>216</sup> Ibid

<sup>217</sup> Shephard, M. (2009); *Parliamentary Scrutiny and Oversight of the British 'War on Terror': From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions*. Pp. 191.

<sup>218</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*. Pp. 32.

parliamentary backlash over security policy, most notably the proposal to increase the number of days police would be permitted to hold terrorist suspects without charge'.<sup>219</sup>

Feldman argues that the idea of electoral democracy in policy making is 'seductive'. A number of influences prevent the notion of 'electoral democracy' from being a standalone interrogative process. For Feldman legislation (not just anti-terror), is typically framed in secret, pushed through parliament at speed, manipulated by the authority of the party whip and timetabled to streamline the business of parliament. Moreover, debate is often 'dominated' by party-politics rather than the merit of the legislation.<sup>220</sup> This is further complicated with the difficulty faced by parliament and associated bodies in obtaining useful information. The alleged sensitive nature of material can make the government and various agencies reluctant to disseminate information. This coyness therefore can make it impossible for parliament and its committees to say whether a measure affecting rights is justified.<sup>221</sup>

Weaknesses in parliamentary control, however, have been documented by scholars specifically reviewing parliamentary procedure for the ATCSA 2001. Shepard notes that 'Although impossible to verify, there is a suspicion that some of the defeated clauses were 'carefully calibrated concessions' that create the impression of effective parliamentary control while in fact being included in the draft with no expectation that they would ever get through scrutiny'.<sup>222</sup> This observation by Shepard could explain why some contestable clauses and measures remained in the legislation with the executive having incorporated the 'carefully calibrated concessions' to both detract from the real concerns with policy; and further, to allow parliament to feel a sense of achievement in revoking clauses with obvious human rights incompatibilities. The politics of the parliamentary system as an oversight mechanism leave it fragile and open to manipulation. This manipulation of parliamentary scrutiny is further compounded by party political systems posing significant difficulties for

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<sup>219</sup> Shephard, M. (2009); 'Parliamentary Scrutiny and Oversight of the British "War on Terror": From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions'. Pp. 204.

<sup>220</sup> Feldman, D. (2006); *The Role of Parliaments in Protecting Human Rights: A View from the UK*. Pp. 4.

<sup>221</sup> *Ibid.* Pp. 13.

<sup>222</sup> Shephard, M. (2009); 'Parliamentary Scrutiny and Oversight of the British "War on Terror": From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions'. Pp. 194.

parliament, personified by the use of 'whipping' to ensure party unity.<sup>223</sup> It is not, of course, the case that parliamentarians never vote against the government and never dissent even in hypersensitive areas such as security. However, such dissent is rare and tends to arise mostly where the popular tide has already turned from fear of terrorism to discomfort with counter-terrorism. Nonetheless, on the issue of 90 day pre-charge detention, despite the imposition of a three-line whip, MPs voted against the extension by 322 to 291. In this vote, 49 labour members rebelled reinforcing the scope for parliament as an oversight mechanism to operate effectively. However, the whip, the influence of patronage and the associated impact of a further promotion are significant systemic disincentives to rights-based dissent from the executive's desired course of action. As De Londras and Davis note, the risk of losing electoral support cannot be easily counteracted. A panicked and concerned electorate might see failings to support terrorism measures as being soft on terrorism. This 'soft on terrorism' approach was personified by the naming and shaming of MPs who voted against 90 day pre-charge detention, in *The Sun* newspaper. Terrorism related emergencies, whether real or imagined, are therefore likely to result in more compliant behaviour by the majority of parliamentarians.<sup>224</sup>

The importance of the unelected chamber in the challenge that can be made to the executive must also be considered when assessing the catalogue of oversight mechanisms available for parliament. There are a number of reasons for the substantial influence which the unelected chamber can have in the scrutiny of legislation. Firstly, the removal of a large number of hereditary peers means that no single party has enjoyed a majority in the chamber. Secondly, the focus on 'life peers' has allowed for a degree of independence in the vigorous scrutiny process. Thirdly, with the emphasis on life peers, there is a supposed sense of legitimacy to the scrutiny the House of Lords provides. Fourthly, by virtue of the Law Lords, the Lords 'arguably has better legal expertise than the commons and so will be better disposed to reveal weaknesses in government legislation.'<sup>225</sup> The influence of the House of Lords will be addressed in the case studies reviewed in Section II. It should be

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<sup>223</sup> In situations of high tension or perceived crisis such as a terrorist threat it is frequently the case that parliamentarians are subjected to the most extensive kind of whip, i.e. the 'three line whip'.

<sup>224</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*. Pp. 36/37.

<sup>225</sup> Shephard, M. (2009); 'Parliamentary Scrutiny and Oversight of the British "War on Terror": From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions'. Pp. 195.

noted that the powers of the House of Lords in relation to primary legislation are substantially restricted by the Parliament Acts 1911 and 1949 and, as such, some of the ways in which the House of Lords takes part in the supervision of the executive are through its work on select committees.<sup>226</sup> This reason alone reinforces the continued importance of utilising committees such as the JCHR to invigorate and drive debate on the house floor.

Parliamentary oversight is further ascertained by the use of select committees. Dyzenhaus reminds us that institutions, other than the courts, may well be able to contribute to a broader institutional attempt to limit the abuse of discretionary emergency powers and uphold principles of legality provided that the courts retain the ability to check abuses of powers.<sup>227</sup> However, the scrutiny of measures can only be performed based on the information available.<sup>228</sup> A significant development in the armour of the oversight process through the JCHR will now be reviewed assessing its influence to date both perceived and applied.

### **2.2.1 JCHR:**

Scholars such as Hunt<sup>229</sup> and Klug<sup>230</sup> have carried out research into the influence and effectiveness of the JCHR which, as mentioned in the introduction, facilitates parliamentary provisions for oversight of executive actions. Established in 2001, the JCHR was created to scrutinise legislation for compliance with the HRA and human rights commitments.<sup>231</sup> Klug and Wildbore express that, as the first permanent joint committee of both Houses, it was in effect a 'new species'. The JCHR was a 'standing joint committee with a broad, and largely undefined, remit'. More significantly, for the purposes of its review capacity, was the JCHR's ability to determine 'which human rights matters it would consider and what working

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<sup>226</sup> Turpin, C. and Tomkins, A. (2007); *British Government and the Constitution*. Pp. 642-643.

<sup>227</sup> Ramraj, V. (2007); *Between Idealism and Pragmatism*. Pp. 195.

<sup>228</sup> It was evident from the discussions analysed that very little discussion is undertaken within the Houses of Parliament on the findings of committees such as the JCHR. This maybe the result of the executive reviewing reports and implementing change prior to a Bill being introduced into the house, however, as will be seen in the assessment of the ATCSA 2001, this was not the case and had heed been taken of the JCHR's findings, the outcome in *Re A* may have produced different results. For further assessment of this see works by Hunt, M.

<sup>229</sup> Hunt, M. *Parliament and Human Rights. Redressing the Democratic Deficit*.

<sup>230</sup> Klug, F. (2007); *Breaking New Ground: the Joint Committee of Human Rights and the role of Parliament in Human Rights Compliance*.

<sup>231</sup> *Bringing Rights Home, Labour's Plan to Incorporate the ECHR into UK Law*. Pp. 12.



practices to adopt'.<sup>232</sup> The role of the committee was defined early on as to alert both Houses of Parliament to the 'risk of proceeding to legislate in a manner which will later be held by a court to be incompatible with the ECHR'.<sup>233</sup> Indeed, while reviewing proposed anti-terrorism legislation, the JCHR referred to its role as that of 'parliamentary guardian' of the HRA and emphasised the importance of protecting the 'core values of a democratic society such as individual autonomy, the rule of law and the right to dissent' which 'must not lightly be compromised or cast away'.<sup>234</sup>

Claims of extensions in parliamentary scrutiny through the JCHR, however, have not been completely encapsulated by all and as such the work and influence of the committee has been subject to numerous reviews. Tolley,<sup>235</sup> in his work on the parliamentary scrutiny of rights in the UK, drew on a number of studies to ascertain the extent to which the JCHR has been successful in fulfilling its purpose and, further, the effect its reporting has on the legislative process. Tolley notes that, whilst the enactment of the HRA necessitated some form of oversight mechanism, it was parliament who created the JCHR so that independent review could take place unadulterated by the executive or courts.<sup>236</sup> Too much emphasis on the functionality of the JCHR, however, may misplace the actual impact the committee has. As Feldman notes, 'it does not adjudicate on human rights matters: it only advises. It has no power, but it has some influence'.<sup>237</sup> From the outset of the committee there were various views on the purpose and functions of the JCHR.<sup>238</sup> However, Klug and Wildbore identify that a common theme is for the committee to assist parliament in providing 'independent scrutiny of executive policy and legislation'.<sup>239</sup> This observation by Klug and Wildbore is substantiated by the findings of Hiebert<sup>240</sup> who recognises that the process of scrutiny serves several functions. The first of these is to 'alert parliament' about the implications of

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<sup>232</sup> Klug, F. and Wildbore, H. (2007); *Breaking New Ground: the Joint Committee on Human Rights and the role of Parliament in Human Rights Compliance*. Pp. 234/235.

<sup>233</sup> *The Work of the Committee in the 2001-2005 Parliament, Nineteenth Report, Session 2004-2005*. Para 44

<sup>234</sup> Para 5, JCHR 2<sup>nd</sup> Report, (2001-02).

<sup>235</sup> Tolley, M. (2009); *Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights*.

<sup>236</sup> *Ibid.* Pp. 43-45.

<sup>237</sup> Feldman, D. (2004); *The Impact of Human Rights on the UK Legislative Process*. Pp. 115.

<sup>238</sup> For further discussion see Klug, F & Wildbore, H. (2007); *Breaking New Ground: the Joint Committee on Human Rights and the role of Parliament in Human Rights Compliance*.

<sup>239</sup> Klug, F. and Wildbore, H. (2007); *Breaking New Ground: the Joint Committee on Human Rights and the role of Parliament in Human Rights Compliance*. Pp. 235.

<sup>240</sup> Hiebert, J. (2006); *Parliament and the Human Rights Act: Can the JCHR help Facilitate a Culture of Rights?* Pp. 21-23.

rights on the Bill reviewed. Secondly, the very fact that the JCHR provides 'systematic scrutiny' prompts the creators of the Bill to 'ensure that they are attentive to the consequences'. Thirdly, the JCHR can perform the function of assessing government responses to judicial declarations of incompatibility. Fourthly according to Hiebert, is that the JCHR provides legal advice to parliament with respect to questions of compatibility.<sup>241</sup> In the same vein as Hiebert, Lord Lester of Herne Hill confirms this function suggesting that the JCHR has effectively become Parliament's 'legal advisor on human rights'.<sup>242</sup> Whilst these observations may be presented, the flexibility of the role of the JCHR leaves its core and fundamental responsibilities open to debate based on its wide remit and self-direction.

In light of the intended aim to use parliament as a check on the executive and helping to create better laws and challenge potential executive abuse of power by passing legislation with ingrained and identifiable rights problems, the question remains over the effectiveness of the JCHR. In 2006 Smookler established that the influence of the JCHR varied from Bill to Bill. Testing this Klug confirms that, although the work of the JCHR was known to both Houses of Parliament, the actual impact of the JCHR on the 'outcome of legislation is another matter'. Indeed Klug's findings unearthed that the JCHR's impact could only be detected in 3%<sup>243</sup> of Bills reported on.<sup>244</sup> This, as Tolley notes, casts some doubt on the effectiveness of pre-legislative scrutiny. Using the ATCSA 2001 as an example Powell confirms that there were no amendments to the government's proposal following sixteen hours of debate. More importantly Powell recognises that 'If parliamentary debate is unable to affect changes to potential legislation that breaches human rights standards, its effectiveness must be questioned'.<sup>245</sup> As Hiebert<sup>246</sup> identifies, following sustained pressure and parliamentary reports through the JCHR both prior to the ATCSA being enacted and following, the compelling factor for the government to reassess its legislation was the ruling in *A v Secretary of State (Re A)*.<sup>247</sup>

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<sup>241</sup> Ibid. Pp. 21-23.

<sup>242</sup> HL Vol. 636, Col. 1122, Lord Lester.

<sup>243</sup> Klugs findings were based on 16 of 500 Bills examined reporting on the findings of the JCHR.

<sup>244</sup> Klug, F. (2006); Report on the working practices of the JCHR. 23<sup>rd</sup> report of session 2005-2006. Appendix 1.

<sup>245</sup> Powell, R. (2006); Comparative Constitutionalism and Rights: Human Rights, Derogation and Anti-Terrorist Detention'. Pp. 79.

<sup>246</sup> Hiebert, J. (2005); Parliamentary Review of Terrorism Powers. Pp. 677.

<sup>247</sup> [2004] UKHL 56.

As a new and developing committee with a wide remit and significant expectations on the delivery of reports, Klug and Wildbore suggest seven success criteria for the JCHR. Although this is not explicitly identified anywhere these criteria, according to Klug and Wildbore, can be located from the work of the committee itself and suggestions by members. The criteria are firstly to provide advice on human rights compatibility of proposed legislation in a timely manner to influence parliamentary debates.<sup>248</sup> Secondly, the criteria are to increase awareness within government departments that every Bill will be examined, enhancing parliament's influence on legislative outcomes.<sup>249</sup> Thirdly, they are to provide an incentive to government to carry out rigorous compatibility scrutiny of policy proposals at department level. Fourthly, the criteria are to act as a check on the executive. Fifthly, they are to 'infuse' human rights into the policy process and sixthly, to gather and monitor evidence from all areas of law creation and implementation to assess for compatibility. Finally, the criteria are to influence debate both inside and outside of parliament.<sup>250</sup> If these criteria can be embedded into the everyday understanding of the role of the committee, the expectations of delivery and the beneficial nature of their specific scrutiny capabilities, the role of the JCHR could become a fundamental asset to the wider oversight machinery.

Raising awareness and actually influencing legislative outcomes are two different matters. Whilst the intentions of the JCHR are well founded, the empirical evidence suggests that, in fact, its direct influence on preventing government passing dubious legislation has not been as significant as anticipated. In her review of the JCHR, Klug identifies the difficulty in ascertaining the impact of the JCHR's reports on debate in parliament. After analysing all references to the JCHR from both Houses of Parliament for a 10-month period of the 2005-2006 session, it was established that 'there were only 59 references to the JCHR in the House of Commons and 118 in the House of Lords'.<sup>251</sup> Nicol comments that the JCHR 'tends to restrict itself to making predictions as to whether legislative provisions breach the ECHR. It does not initiate debate about what the rights in the ECHR ought to mean'.<sup>252</sup> This can have the effect that 'legislatures argue like judges whilst courts assume a legislative role the

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<sup>248</sup> The Work of the Committee in the 2001-2005 Parliament, Nineteenth Report, Session 2004-2005. Para 41.

<sup>249</sup> New Politics, New Parliament? A Review of Parliamentary Modernisation since 1997. Pp. 27.

<sup>250</sup> Klug, F. and Wildbore, H. (2007); Breaking New Ground: the Joint Committee on Human Rights and the role of Parliament in Human Rights Compliance. Pp. 238.

<sup>251</sup> Klug, F. The Klug report: Report on the Working Practices of the JCHR'. Table 4.

<sup>252</sup> Nicol, D. (2004); The Human Rights Act and the Politicians. Pp. 453.

boundaries between law and politics disintegrate and the separation of powers ceases to be a worthwhile concept'.<sup>253</sup> As a result of the wide scope and self-defining examinations undertaken by the committee, it is less structured than at first considered and as such may not have fitted adequately within the constitutional framework as it may have first appeared.

Scepticism remains over the realistic accomplishments of the JCHR, particularly within a Westminster parliamentary system. Indeed Hiebert documents that the idea of the JCHR was initially considered 'at odds with traditional expectations that rights are protected by parliament'.<sup>254</sup> Having reviewed the historic notion of parliamentary checks on executive power and a brief insight into the influence of the JCHR it is evident that, although parliamentary oversight in theory should occur, the chances of dissent against executive extension of powers unadulterated by the influence of a political agenda remain slim when assessing the checks available to parliamentary review, particularly when reviewing rights and security debate.

### **2.3 Judicial review and the influence of case law:**

Heightened fear of international terrorism, and the threat it presents has led a number of states to adopt coercive responses to terrorism. With influences from European and international legislation<sup>255</sup> the executive and the judiciary have found themselves inadvertently conflicting, most notably on issues of rights and security. Emergent case law, both pre and post 9/11, has generated discussion between the functions of the judiciary and the executive. This discussion has viewed the judiciary, both from an historic perspective where courts were often seen to defer power to the executive and, more recently, in the protection offered to rights through the judicial use of declarations of incompatibility.<sup>256</sup> The actions on both sides of the debate however identify that the role of the judiciary cannot be overlooked in the balance debate either conceptually or pragmatically.

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<sup>253</sup> Ibid. Pp. 453.

<sup>254</sup> Hiebert, J. (2006); Parliament and the Human Rights Act: Can the JCHR help Facilitate a Culture of Rights? Pp. 14.

<sup>255</sup> UN SCR 1373.

<sup>256</sup> However as was witnessed earlier from the findings of Klug, the real impact of these declarations of incompatibility remains unclear.

### 2.3.1 Change in the role of the judiciary in a post HRA era:

In his article '*Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism*',<sup>257</sup> Brandon notes that Britain has tremendous experience in dealing with the impact and threat that terrorism can have on a society. Anti-terror legislation and security issues are, therefore, not alien to either the judiciary or the executive. However, the framework in which the executive and the judiciary now work has changed in recent years. As Shephard notes, whilst the introduction of the HRA has not 'trumped' parliamentary sovereignty, human rights transgressions highlighted by court rulings 'undermine the legitimacy of parliamentary legislation'; a contributory factor in the repeated revisit to anti-terror legislation.<sup>258</sup>

In a mature democracy it is important that judges are independent both of parliament and government and not merely a rubber stamp for the executive. The HRA brought to the UK courts a need to consider the separation of powers and to reinforce values that are central to rights protected by the ECHR.<sup>259</sup> Historically, decisions about national security or deportation and detention on security grounds were considered political, grounded in sensitive information and therefore not justiciable or amenable to judicial review.<sup>260</sup>

For Phillips<sup>261</sup> and Mr Mallins, the rise of judicial activism and rights culture stemmed from developments that changed the way judges saw themselves. For example, moves undertaken by the Labour Government in 1997 encouraged judicial activism by integrating the ECHR into English law.<sup>262</sup> Defence of individual rights by the judiciary has led to MPs questioning the UK's involvement with the ECtHR, particularly the power the HRA places in the hand of the courts at the expense of the elected representatives. Teddy Taylor claims;

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<sup>257</sup> Brandon, B. (2004) *Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism*. Pp. 981-997.

<sup>258</sup> Shephard, M. (2009); *Parliamentary Scrutiny and Oversight of the British 'War on Terror': From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions*. Pp. 209.

<sup>259</sup> Bradley, A. & Ewing, KD. (2006); *Constitutional and Administrative Law*. Pp. 84 – 92.

<sup>260</sup> Dyzenhaus, D. (2007); *Deference, Security and Human Rights*. Pp. 133.

<sup>261</sup> Phillips, M. (2006); *Londonistan. How Britain is creating a Terror State Within*.

<sup>262</sup> HC Vol. 415, Col. 1617, C. Mullins; 'It is something of an irony that the Prime Minister, when he was Leader of the Opposition, championed the right of individuals to have access to the highest courts in the land, yet now talks to his party conference about the problems that the Government face from what he describes as "judicial interference". When the Government accuse the judiciary of interfering, it is time to be very concerned about our ancient liberties.'

‘While the Government have heard many learned arguments about the merits of the ECtHR, I hope that they will ask themselves whether we could better safeguard our liberty and freedom if Parliament took back the powers. All the powers seem to be going to courts, institutions and organisations over which the people have no control. We must determine where the limits between the Courts and Parliament should be drawn’.<sup>263</sup>

Despite acknowledging the ultimate supremacy of parliament integrating the ECHR effectively transferred considerable political power from parliament to the courts.<sup>264</sup> As Bigo and Guild note:

‘legislation at the national and European levels has already granted governments the possibility of derogating in specific cases, but in interpreting those law and conventions, judges have continually refuted the idea that governments can use such occasions to reframe the boundaries of laws. The exceptions must occur inside the rule of law; they cannot frame the rule of law’.<sup>265</sup>

This reaffirms that the judiciary arguably hold the reins on the direction of legislative moves, if not the power.

De Londras<sup>266</sup> sees recent court decisions as indicative of a shift in judicial reasoning to the creation of a rights enforcing, muscular body capable of supporting liberty. De Londras does not deny the importance of the democratic actors but rather accepts that democratic actors can put in place legislative codes and structures for the protection of security that do not necessarily undermine individual rights. The difficulty for de Londras, however is that, for various reasons, including institutional design and populism, elected lawmakers rarely do so unless either such action has become the politically expedient route or these parliamentarians have been firmly ‘nudged’ towards such law-making by the courts. As a result of this it seems likely that the way in which executive action will be subjected to the most effective form of oversight is through a legislative judicial dialogue focused on

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<sup>263</sup> HC Vol. 391, Col. 604; T. Taylor.

<sup>264</sup> Phillips, M. (2005); Londonistan. Pp. 63 – 64.

<sup>265</sup> Bigo, D and Guild, E. (2007); The Worst Case Scenario and the Man on the Clapham Omnibus. Pp. 111.

<sup>266</sup> De Londras and Davis. (2010); ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism’.

achieving a sustainable, proportionate balance between the exigencies of a security crisis and the fundamentality of rights'.<sup>267</sup> Speaking on the identified unaccountability of the judiciary, President Aharon Barak notes that is precisely because of the unaccountability of the judiciary that it strengthens:

'against the fluctuations of public opinion. The real test of this independence and impartiality comes in situations of war and terrorism. The significance of our unaccountability becomes clear in these situations, when public opinion is more likely to be unanimous. Precisely in these times, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the constitution'.<sup>268</sup>

Utilising the independence of the judiciary, Barak reaffirms the importance of having such a body which can extract itself from political influences and provide oversight based, in theory, on the facts surrounding the decision.

However, as mentioned earlier, whilst tides may have changed in a post HRA era old habits die hard. As Davis notes, a number of historical examples of judicial failure to protect individuals remain in debate; *Zadig* in which Lord Finlay LC stated that 'it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council'<sup>269</sup> ultimately the House of Lords upheld the detention without trial of a naturalized citizen. In *Lawless*,<sup>270</sup> the ECtHR upheld the use of internment without trial on the basis that the IRA border campaign posed a threat to the life of the nation.<sup>271</sup> This historic reluctance of the courts to limit executive power may stem from a belief that the executive is in possession of

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<sup>267</sup> De Londras and Davis. (2010); 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism'. Pp. 45/46.

<sup>268</sup> Barak, A. (2002); 'A Judge on Judging: the Role of the Supreme Court in a Democracy. Pp. 150.

<sup>269</sup> *R v Halliday, ex parte Zadig* [1917] AC 260, 268.

<sup>270</sup> *Lawless v Ireland* (no. 3) (1961) 1 EHRR 1.

<sup>271</sup> In para 22 of its judgment the ECtHR held that it was for it to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation had been made out. Following this, in paragraph 28 and 29 the ECtHR held that the words 'other public emergency threatening the life of the nation' were sufficiently clear and that the Court must determine whether the facts and circumstances which led to derogation were satisfied. The Court were satisfied the criteria had been met based on several factors including the existence of 'a secret army' using violence to attain its purpose in Ireland and outside of its territory as well as a steady increase in the number of attacks. The Court further acknowledged that whilst existing legislation and methods had been used to maintain normality in the nation, the events which triggered the derogation demonstrated 'the imminent danger to the nation caused by the continuance of unlawful activities'.

peculiarly sensitive information regarding the current crisis. The courts might surmise that, while the action appears disproportionate, the executive should be trusted since they are likely to be in possession of more accurate intelligence than any other branch of government.<sup>272</sup>

The decision in *Re A*<sup>273</sup> directed a change in terror legislation post 9/11. As will be seen from the cases presented later, reliance by the executive on judgements has continued to leave open the on-going discussion over roles and boundaries. Even though the executive utilise case law to their advantage in obtaining support for their decision to make moves, the influence of case law in parliamentary debate appears to remain limited. Three cases referenced in *Re A*<sup>274</sup> will be discussed briefly to provide a backdrop to the on-going dispute between the competing functions of the executive and the judiciary regarding the balance of rights and security.<sup>275</sup> Each of the cases reviewed were relied upon in *Re A*.<sup>276</sup> The decision in *Re A*<sup>277</sup> gave rise to major changes in terrorism legislation during the period examined within this thesis and further became a mile stone in the constitutional inferences previously held between the powers which extend to the executive and those held by the courts. As such, the case law which underpins the decision in *Re A*<sup>278</sup> will be important in the understanding of how the decision came about, as well as where the balance in oversight powers between the courts and the executive might lie.

Having briefly established that it is widely accepted that the role of the judiciary has changed in the twenty-first century since the incorporation of the HRA, there still remains concerns over their ability to provide the necessary checks on executive power instead of offering deference to the executive grounded in some deeply held belief that the executive have secret evidence to support the moves made. One arm which remains significantly greyer than most in this debate is the use of the term 'war'. It is long established that the

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<sup>272</sup> De Londras and Davis. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism'. Pp. 27.

<sup>273</sup> [2004] UKHL 56.

<sup>274</sup> Ibid.

<sup>275</sup> As this thesis is designed to examine the influence of 'balance' within parliamentary debate, the presentation of case law is not designed to provide a deep judicial consideration, but merely provide cases considered necessarily relevant in backdrop of considering the strengths and weakness of parliamentary debate.

<sup>276</sup> [2004] UKHL 56.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.



term 'war' allows for greater auspices of power. As such, following 9/11, the 'War on Terror' became used as an associated collective term. Such phrases uses of 'war' have previously engaged special deference from the judiciary and will be briefly established here.

### **2.3.2 The paradigm of war and the influence on judicial scrutiny:**

This research has briefly demonstrated that with notions of risk, the rhetorical nature of threat, attack and devastation, guidance from the SRC and the previous precedent set within case law, there is mileage in the construction of and use of 'war' as an emotive factor for generating support. It incorporates an extension of powers, interpretation of legislation in war time, reliance on case law and the mobilisation of public support. Hoffman argues that, with such grave constriction on rights, it should be questioned whether the war on terrorism is a war and if so what sort of war it is. If the UK does see itself at war, this allows not only for the extension of powers but for the justified use and reliance on international instruments.<sup>279</sup> Hoffman further suggests that due to the unclassified nature of threat the substantive, temporal and geographic scope of the war on terror is unbounded and unknown. This, as mentioned previously, allows for a manipulation of the threat through risk and vulnerability which, in turn, allows the executive to push boundaries of their power; some which have infringed on or eroded rights by failing to accept that the rule of law governs the conduct of the war on terrorism. The severity of the threat in times of 'war' has led to rights protections being overridden when they conflict with the imperatives of the 'war on terrorism'.<sup>280</sup> Accordingly, and as previously identified, with much of the legislative movement which takes place within this framework there is no problem with the rhetorical use of the 'war' metaphor, but there is a problem with the rhetoric unjustifiably becoming policy and altering international legal regime.

Giroux stresses that the rhetoric of terrorism, and its associated phraseology, is important not only because it operates on many registers to both inflict human misery and call into question the delicate balance of freedom and security crucial to any democratic society, but also because it carries with it an enormous sense of urgency that often redefines a

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<sup>279</sup> Hoffman, P. (2004); Human rights and terrorism. Pp. 939.

<sup>280</sup> Ibid. Pp. 939-940.

community against its most democratic possibilities.<sup>281</sup> This, compounded by the emergence of a war paradigm, also has the historic support of judicial deference at its disposal.

It is impossible to deny that there has been a change in the security threat to the UK since 9/11. The asymmetrical and clandestine nature of the enemy has brought with it new types of conflict and risk.<sup>282</sup> This risk and threat from asymmetrical warfare create a nation in crisis. As Ramraj notes, 'in times of crisis, ordinary legal principles stressing the importance of fundamental rights, due process and judicial supervision of legislative and executive power come under strain'.<sup>283</sup> However, what does this mean for rights and security? It is this emphasis on strain, risk, conflict, warfare and security which has been rhetorically manipulated, justly or unjustly, to warrant an extension of provisions beyond what might be deemed necessary or proportionate. The case studies examined discuss balance between security and rights as a tool in justification for moves.<sup>284</sup>

#### **Concluding remarks:**

Having established a number of themes within rights and security discussion; the impact of risk, the use of pre-emptive measures and the impact of oversight mechanisms on managing current security pressures, Bigo and Guild note, 'the balance metaphor does not rely on myths or theory but on the need for rigorous scrutiny of the conditions under which security claims warrant the suspension of liberties and freedoms'.<sup>285</sup> When extensions to powers are required beyond those reasonably expected, 'parliament should be required to earn judicial deference from the courts. This is to be achieved by demonstrating the quality of its reasoned judgements on compatibility, not entitled to expect it by virtue of its sovereign position in the constitution'.<sup>286</sup> Feldman identifies that the constitutional role of the judiciary in relation to policy making is subordinate to that of parliament, which is itself subordinate to that of the executive. Further,

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<sup>281</sup> Giroux, H. (2002); *Democracy and the Politics of Terrorism: Community, Fear and the Suppression of Dissent*. Pp. 336.

<sup>282</sup> Maniscalco, M. (2005); *Constructing and Deconstructing the Enemy: A Sociological Perspective*. Pp. 20.

<sup>283</sup> Ramraj, V. (2007); *Between Idealism and Pragmatism*. Pp. 187.

<sup>284</sup> It is important to note however that this was not the only justification used but is one area of review.

<sup>285</sup> Bigo, D and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 114.

<sup>286</sup> Dyzenhaus, D. (2007); *Deference, Security and Human Rights*. Pp. 153.

‘based on historic notions of constitutional principles, judicial deference to the constitutionally legitimate policy making of the executive may have a place for legitimate discussion. Such deference does not absolve parliament or indeed the executive of its duty to make a legitimate balance between security and rights. However, whilst deference may be constitutionally embedded, courts can review the legitimacy of legislation in action through the practical application of the law. Ultimately it means that the assessment of the executive and parliament is not the final one’.<sup>287</sup>

Even in this clear delineation of powers identified, the legislature can appear beholden to the executive; measures such as the influence of the whip and future careers see to this.<sup>288</sup> Ultimately, the amalgamated strength of the legislature and executive combined results in executive control of parliament, although it should be noted that parliament has acted in recent times to curb unnecessary extensions of power requested by the government. As de Londras notes, ‘while the separation of powers might assume a legislature vigilant to ‘power grabs’ by the executive, the reality appears to be a more submissive beast’.<sup>289</sup> With limited accountability based on the notion that intelligence is too precious to disseminate, it is unsurprising that recent judicial decisions appear reluctant to offer deference.

Without consistent analytical rigour, the rhetoric of a ‘right to security’ will undermine the hard won, carefully reasoned, yet fragile consensus around fundamental rights. Lazarus argues that the rhetorical and political appeal of security has ‘the ability to erode the protections of competing rights such as liberty, as well as undermine accepted understandings of the foundations of fundamental rights reasoning’.<sup>290</sup> This leaves politicians to justify what is ‘necessary in a democratic society’ or whether one person’s right should give way to another person’s conflicting right.<sup>291</sup>

Whilst logically the perceived electoral benefit will outweigh the cost of opposing one’s own party, this can arguably be fostered where parliamentarians believe that another institution,

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<sup>287</sup> Feldman, D. (2006); *Human Rights, Terrorism and Risk: the Roles of Politicians and Judges*. Pp. 375/376.

<sup>288</sup> See Lustgarten, L. (2004); *National Security, Terrorism and Constitutional Balance*. Pp. 8.

<sup>289</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*. Pp. 31.

<sup>290</sup> Lazarus, L. (2007); *Mapping the Right to Security*. Pp. 344.

<sup>291</sup> Ashworth, A. (2007); *Security, Terrorism and the Value of Human Rights*. Pp. 205.

such as the courts, will perform the balance and prevent executive abuses.<sup>292</sup> Indeed the influence of judicial scrutiny ensures that justice is being seen to be done<sup>293</sup> but this, however, does not mean that the judiciary alone can offer effective control of the executive.<sup>294</sup>

This relationship gives rise to a series of counter-arguments demanding a need to strike a new balance between the constitutional roles of the executive and the judiciary. According to Tsoukala,<sup>295</sup> this new balance implies the exclusion of the judiciary from the political scene in the name of an effective fight against terrorism. Therefore, while the judiciary is to protect not only the majority from the minority, but also the minority from the majority, Tsoukala argues it is presumed that justice is not an absolute value but, 'a protection offered to some politically selected social groups'.<sup>296</sup> This is because it is no longer considered a primary condition of democracy. As such, justice has to be taken into consideration over other priorities, including the protection of public safety. As David Blunkett noted;

In seeking justice, not just the justice for the small few who use our democracy to hide in but the justice that comes from ensuring protection for all, we need to remember this – it is justice we seek, not just the primacy of jurisprudence.<sup>297</sup>

Tsoukala argues that there is a presumption that this perception of justice cannot call into question the democratic character of the executive. The simple reason for this is that, historically speaking, 'it is the executive that established democracy while, politically speaking, it is the executive that is mandated by the electorate to create and implement the law'.<sup>298</sup> Whilst the belief that the executive and legislature can instigate restrictions and legislation is true during times of national emergency, there is no doubt, that trusting in the separation of powers doctrine, the oversight mechanisms need to operate in their true role.

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<sup>292</sup> De Londras and Davis. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism'. Pp. 31.

<sup>293</sup> Von Doussa, J. (2006); Reconciling Human Rights and Counter-Terrorism – a Crucial Challenge. Pp. 112.

<sup>294</sup> De Londras and Davis. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism. Pp. 45.

<sup>295</sup> Tsoukala, A. (2006); Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies.

<sup>296</sup> Ibid. Pp. 613.

<sup>297</sup> The Guardian, 'On the brink of War: Blunkett Unveils Tougher Laws on terrorism'. 4<sup>th</sup> October 2001.

<sup>298</sup> Tsoukala, A. (2006); Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies. Pp. 613/614.

As noted previously, there are very few rights which are absolute;<sup>299</sup> those which are not can therefore be curbed when necessary. Simply because a right has changed, been infringed on or removed does not necessarily deem it to be violated. As Waldron identifies,

‘a right is violated when it is unjustifiably infringed, a right is overridden when it is justifiably infringed so that there is sufficient justification for not carrying out the correlative duty and the required action is justifiably not performed or the prohibited action is justifiably performed’.<sup>300</sup>

This reaffirms the importance of demonstrating why a right is ‘justifiably’ infringed and reinforces the executive’s need for greater openness to evidence. In this context, the argument for supporting rights depends on ‘what the general background justification for political decisions, the right in question proposes to trump’.<sup>301</sup> Having established that violations of individual rights may be required, the oversight mechanism is fundamental to ensuring that policies are confined to the necessary.<sup>302</sup> Therefore, control of the executive is arguably best achieved not only by a balance of the concepts themselves and the external factors influencing such discussion, but also by a balance of the competing interests in the separation of powers as ‘neither parliament nor the judiciary can achieve effective oversight of the executive on their own’.<sup>303</sup> Throughout this research the aim remains to ascertain whether any of the positions presented here emerge from within the legislative discussions examined. Feldman notes that whilst the need to interfere with liberty in order to protect life may be necessary, the need remains for those who determine such measures to uphold a number of principles if democratic values are to survive. For Feldman;

‘First there must be a clear necessity for any restrictive measures. Secondly, the restrictions must go no further than is required. Thirdly, the measures must be controlled by law. Fourthly, the law must be cast in such a way as to make sure that

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<sup>299</sup> Article 3 is an example of an absolute right as confirmed in the case of *Chahal v. UK* (1996) 23 EHRR 413

<sup>300</sup> Waldron, J. (1984); *Theories of Rights*.

<sup>301</sup> Dworkin, R. (1984); *Rights as Trumps*. Pp. 153.

<sup>302</sup> De Londras and Davis. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*. Pp. 22.

<sup>303</sup> *Ibid.* Pp. 45.

any interference with liberty is clearly and rationally related to the aim of protecting security'.<sup>304</sup>

These principles offered by Feldman are simple questions which could be methodically worked through within a politically charged debate. Whilst each question may raise further questions which may blur the boundaries of rights and security, this viewpoint may help validate how decisions are made. Section II will aim to identify whether such principles are considered or actively engaged in when examining legislation.

It is important to note that the findings of the JCHR will not be subjected to the systematic and rigorous coding process that was undertaken within the debates from the Houses of Parliament. This research is designed to examine the role of parliament in the use of balance debate with the aim to identify if systematic examinations of issues arise or whether a lack of continuity, expertise and other shortfalls confirm that in fact the twenty-first century law making process in the UK remains constitutionally weak. Whilst significant in their expertise, they remain *influential* in the parliamentary process as opposed to *fundamental* to it. As such, to embed them in the quantitative data would skew the data in favour of looking at weaknesses within the legislation either proposed or enacted. Within the quantitative process, reference to the JCHR was coded, however, they remain absent from quantitative findings as standalone issues.

The following chapter will present the quantitative findings from the investigation of the House of Commons examination of UK anti-terror legislation as identified in the introduction to this thesis. A chronological format is applied to aid a review of any transition between the review processes which may emerge as a result of the findings. The quantitative data presented in the following chapter is subject to the same limitations as those outlined in the methodology.

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<sup>304</sup> Feldman, D. (2006); Human Rights, Terrorism and Risk: the Roles of Politicians and Judges. Pp. 371.

# Chapter Three

## Quantitative Results and Findings:

The aim of this thesis is to try and establish if, during the legislative processes, a balancing debate is entered into between security and rights. The time frame to be examined, as mentioned in previous chapters is from 14<sup>th</sup> September 2001 (Volume 372) to the 30<sup>th</sup> March 2006 (Volume 443). These dates have been selected for review as they coincide with the events of 9/11 in the US and the Royal Assent of the TA on the 30<sup>th</sup> March 2006. Consideration was given to starting the review from the outset of the TA 2000 as this would have provided discussion outside of the ‘war on terror’ framework and may have provided results for a comparative study between the two periods.<sup>305</sup> However, due to the focus of this thesis on security and rights, it was considered more apt to start from the trigger of what has been considered the era of ‘new threat’. The period of review further encompassed the events of 7/7. This was so that a thorough review could be carried out to ascertain whether political opinions shifted within the timeframe examined.<sup>306</sup>

This chapter looks to guide the reader through the debate undertaken in both legislative and political discussions held within the House of Commons.<sup>307</sup> The reader will be taken chronologically through emerging terrorism legislation within the period of study identified above.<sup>308</sup> This will then be broken down further explicitly addressing terrorism legislation in detail. A thorough examination and coding process of Hansard volumes 375-443 was undertaken. It became apparent that to focus on terrorism legislation alone would not reflect the emphasis or awareness displayed by parliament in the debates throughout the period of study. To understand the full political picture, any debate raised which reviewed or discussed national security or human rights was coded in line with the legislation

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<sup>305</sup> This is an issue that will be noted in the conclusion that with hind sight I would have also examined the shift between these two periods.

<sup>306</sup> All figures presented here have been collected from debates in the House of Commons and are not inclusive of the House of Lords. This decision not to incorporate the coding results from the House of Lords, was based on using how the ‘elected chamber’ examined highly public legislation and secondly to provide a similar format to the forthcoming chapters by using a case study to help review findings.

<sup>307</sup> The political discussions were established through the initial data mining as identified in the methodology.

<sup>308</sup> This will focus however only on terrorism legislation within UK borders. For the purposes of examination NI legislation was omitted.

reviewed. These debates were then organised into nine political debate headings and two legislative debates for the purpose of this research.<sup>309</sup> Political debate included 'Acts of International Terrorism', 'Middle East Peace Process', 'Northern Ireland', 'Afghanistan War', 'Defence Policy', 'International responses to terrorism', 'Coalition against terrorism', 'Iraq War', 'International Terrorism – generic discussion', and 'other debate'.<sup>310</sup> The two legislative areas of review considered, aside from anti-terrorism legislation, were ID Cards and Immigration and Asylum legislation.

In this chapter raw data will be used to establish the frequency of specific debate within the wider legislation as points of discussion.<sup>311</sup> In this initial stage the data will receive a very narrow assessment of the content limiting the quality of the information. The findings presented in this chapter are provided to support the information documented in the following chapters. The initial research, without the quantitative findings, failed to offer substantiated evidence leaving the findings too subjective to be reliable. The intention of using the statistical data presented here is to provide objective findings in the raw data to validate the subjective selection of information in the preceding chapters. It is important to note that this raw data does not acknowledge how long discussion lasted but simply the number of times the issue was substantively raised as detailed in Section II. It is hoped that this dual method of displaying the findings will allow for greater objectivity and accuracy in the results. Personal bias can be minimised by using the statistical data to substantiate the quantitative data presented later in this thesis. This multi-stage process became incorporated in the findings after the identification of weaknesses in the first assessment. The qualitative and quantitative method came about to support the decisions reported on and to help reduce the subjectivity in the selection of political debate represented.

The data was initially broken down into subject of debate then into categories preceding this. Discussion was then logged on a basis of frequency within discussion. The data has been compared and contrasted to establish similarities and differences and the inter-

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<sup>309</sup> There is no scientific reason for there being 9 headings; this was simply the number of categories the findings fell into.

<sup>310</sup> The debate identified as 'Other' gathered debates which were not considered substantial enough to create their own category. Five or more debates/discussions were identified at the onset of the research to warrant a separate coding system. Nonetheless the issues raised did fall into the framework of this thesis and, as such, have been logged. The group 'other' will not be addressed in this discussion.

<sup>311</sup> Point of discussion is where the emphasis of issues raised centred on the point not one in passing.



relationships between the groups. The coding process started with a summary of the text being examined, which in this case was the data documented in Hansard. This initial stage was performed through a process of 'descriptive coding' because it essentially formed a summary description of what was in the transcript. This was then broken down further through the coding process by 'analytic or theoretical' coding. The codes here were based on themes, topics, ideas, concepts, terms, phrases and keywords in line with the methodology outlined in the introduction. The coding system in this particular research is considered to be 'flat'; that is, the coding is non-hierarchical and takes the form of a list with no sub-code levels.

When analysing debate, a number of unsubstantiated individual points were raised. These areas which received only one point of discussion throughout the debate were then captured together and considered under the title 'Miscellaneous'. When presenting the data the first percentage provided is calculated with the removal of the miscellaneous category and the data provided within the brackets is the percentile of discussion points raised including the miscellaneous category. During the review process of the data every discussion point raised was reviewed to see if it fitted appropriately with any other group. Any points which could not be suitably allocated remained within the miscellaneous category.

The results presented in this chapter are demonstrated through statistics, tables and graphs. These results will offer limited interpretation so further examination will follow in Section II. This research is not designed to be a statistical assessment of parliamentary debate but uses quantitative measures to support the qualitative findings. The first Act to be examined is the ATCSA 2001.

### **3.1 ATCSA 2001:**

**12<sup>th</sup> November 2001** – Bill introduced to Commons floor

**19<sup>th</sup> November 2001** – Second reading to the house

**26<sup>th</sup> November 2001** – Conclusion of consideration in committee stages and remaining ATCS Bill discussion

**12<sup>th</sup> December 2001** – Consideration of the Lords' amendments to the ATCS Bill

**14<sup>th</sup> December 2001** – Bill receives Royal Assent

In the period leading up to the introduction of the ATCSA 2001 to the parliamentary floor, the UK witnessed a shift in rhetoric towards terrorism. Having suffered for decades at the hands of terrorism from the IRA, the UK became a leading nation in the 'War on Terror'. In a televised address President George W. Bush Jr. informed the world that 'Our War on Terror begins with Al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated'.<sup>312</sup> The world had witnessed the devastating terror attacks of 9/11 on the USA and a new era of threat to security was identified. This identification led to academic discussion as to whether a new era of threat or a new era of control had emerged. Huysmans, in 2008, claims that 'insecurity is a politically and socially constructed phenomenon'.<sup>313</sup> In line with Huysmans' theory, the events of 9/11 may have facilitated the executive in using 9/11 to signify a threat, danger, or risk to the nation. An awareness of this potential for framing may reiterate the possibility of an era of control.<sup>314</sup>

Explanatory notes identified that the purpose of the Bill was to 'strengthen legislation in a number of areas to ensure that the government, in light of the new situation arising from the 9/11 terrorist attacks on New York and Washington DC, have the necessary powers to counter the increased threat to the UK'.<sup>315</sup> The ATCSA went from its first reading to Royal

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<sup>312</sup> [http://articles.cnn.com/2001-09-20/us/gen.bush.transcript\\_1\\_joint-session-national-anthem-citizens?\\_s=PM:US](http://articles.cnn.com/2001-09-20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens?_s=PM:US) (Accessed 28/11/11).

<sup>313</sup> Huysmans, J and Buonfino, A. (2008); 'Politics of expectation and Unease: Immigration, Asylum and Terrorism in Parliamentary debate in the UK'. Pp. 2.

<sup>314</sup> Ibid. Pp. 4-7.

<sup>315</sup> <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/049/en/02049x--.htm> (Accessed 9/11/2011).

Assent within 33 days. The speed with which the ATCSA went through parliament was a substantive issue raised throughout discussion. Its speed raised more discussion points than the debate over security and rights at every stage identifying that such speed was a key concern. Particular concern was raised that such speed would inhibit parliament from performing its review functions efficiently and effectively.

At its introduction, Douglas Hogg requested a statement to be made by the Home Secretary explaining the executive's rationale behind the legislation. Mr Hogg perceived the legislation to be a 'serious derogation from human rights'.<sup>316</sup> This was based on the claim that a public emergency existed in the UK and that the provision for derogation from the ECHR to allow for detention without trial needed clarification. This concern for further explanation of the proposals outlined within the Bill was later seconded by Mark Fisher. Mr Fisher reiterated the need for the Home Secretary to present to the House for questioning the basis of the proposals that, if passed, would make substantial changes to the UK's human rights legislation.<sup>317</sup> This demonstrated that immediate concern was raised about the impact on rights thus identifying that MPs were actively aware of the responsibilities parliament has to protect rights from unnecessary restrictions. Further to this it illustrates that the checks and balances system was in operation.

Three debates were scheduled for the ATCSA.<sup>318</sup> Following the initial coding process, three substantive headings were created. Firstly, balance between security and rights; secondly, discussion brought up specifically on security; and thirdly, discussion raised on rights issues.<sup>319</sup> A number of areas were coded however, with the focus of this thesis centred on security and rights these particular themes will be demonstrated here. Accrual of all discussion points raised on security and rights for each of the debates has provided the following findings; 19<sup>th</sup> November 2001 accrued 30% (27.9%) of the debate, 26<sup>th</sup> November 2001 accrued 5.5% (5%) of the debate and the 12<sup>th</sup> / 13<sup>th</sup> December 2001<sup>320</sup> accrued 3% (2.7%) of the debate. The chart below (Fig 1) demonstrates how security and rights

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<sup>316</sup> HC Vol. 374, Col. 572, D. Hogg.

<sup>317</sup> HC Vol. 374, Col. 572, M. Fisher.

<sup>318</sup> Three debates were scheduled but, due to one running past midnight, the debate was reconvened the following morning.

<sup>319</sup> The issues raised are not necessarily an indication of support for either theory but are collectively examined to demonstrate the awareness of MPs of these theories.

<sup>320</sup> This fell across two days as debate ran past midnight so was adjourned until the following morning.

discussion was weighted across the three debates. It indicates clearly how the weighting on rights and security were far greater at the start of the process compared to that of the final debate.

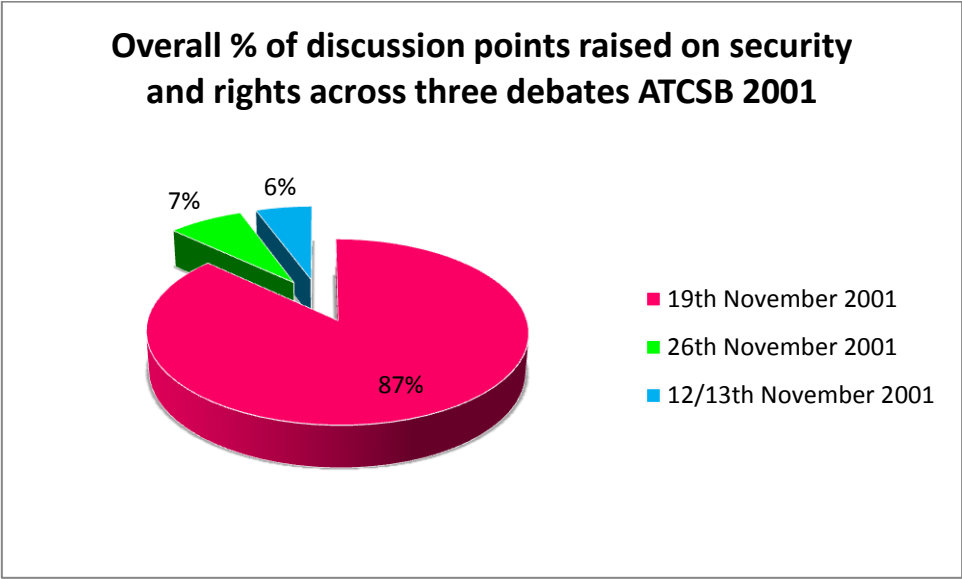


Figure 1

As can be seen from these results there was a distinct decrease in the emphasis placed on security and rights as the legislation passed through the necessary stages. It is clear from the data captured that the debate on the 19<sup>th</sup> November 2001 raised the greatest number of discussion points and was substantially higher in its emphasis on security and rights. This is possibly the result of the debate following the considerations from committee stages. The decrease in discussion may be reflective of the lack of time on the house floor.<sup>321</sup> The limited time available may have meant that wider debate on the political implications and social consequences became prioritised. It may also reflect that amendments had been made at the initial stages. Nonetheless, further analysis goes beyond the scope of this research.

Breaking the results down further, discussion held on the 19<sup>th</sup> November 2001, where 30% of discussion points focused on rights and security, the theme of security v rights accounted for 6.4%, security accrued 10.3%, and rights 13.2%.<sup>322</sup> The clearest example of discussion within the house between a balance of security and rights emerged via discussion on Article

<sup>321</sup> Although it is not known how much time was allotted.

<sup>322</sup> 0.1% was lost in the rounding of percentages to just one decimal point.

3 ECHR; namely, the right to remain free from ‘inhumane or degrading treatment or punishment’.<sup>323</sup>

Both rights and security raised discussion issues on the impact of Part 4 of the ATCSA. It could be argued that these discussion points should fall under the heading security v rights, however, there was no explicit balance or justification made between the two sides of the debate. In these cases, the discussion has been aligned with the theme it represents. Explicit support for Part 4 was discussed only six times compared to the discussion points raised on the concerns over it, which raised nearly triple that with 16 discussion points. Individual case studies will be explored in later chapters and will identify a number of issues which will help substantiate these findings.

Debates from the 26<sup>th</sup> November 2001 and the 12<sup>th</sup> / 13<sup>th</sup> December 2001 generated a large number of miscellaneous discussion points. This figure will dilute the impact of the overall values found within the findings (as a percentage) as the high number of ‘miscellaneous’ will accrue a higher overall value. These have not been included in the examination of the debate although they have been coded and logged to maintain a consistent approach to examination of the discussion. As demonstrated earlier, a very small percentage of the debate examined here addressed issues on security and rights. This is particularly interesting as the House of Lords had raised concerns about aspects of the legislation, in particular the legality of Part 4, therefore it was expected that a greater number of points would have been raised. Having acknowledged this, however, it is known that a number of concerns were raised by the JCHR yet these observations appear not to have been discussed or relied upon in debate.

In both of these debates<sup>324</sup> there was a greater focus on the constitutional aspect of the legislation particularly the requirement of checks and balances<sup>325</sup> meaning that emphasis was on the process rather than the impact of the legislation. By identifying the impact that a lack of judicial review would have on proceedings, there appears to be an implied connection to the rights of the individual. This may suggest that MPs believed that

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<sup>323</sup> Article 3 ECHR.

<sup>324</sup> 26<sup>th</sup> November 2001 and the 12<sup>th</sup> / 13<sup>th</sup> December 2001.

<sup>325</sup> 12/12/01 29% (26.7%), 26/11/11 6.3% (5.6%) – these are the statistics for the combined discussion points on constitutional principles.

constitutional principles could protect individuals rather than reliance on the European framework. The initial concerns of security and rights may have become so political that reliance on constitutional principles avoided the politics of decision making by removing the emotive element of the decision. By moving rhetoric away from the charged concepts of security and rights to constitutional principles, MPs avoided being branded as 'soft on terrorism' yet still represented protection to the individual. This line of discussion still played a significant role in the debate on the 19<sup>th</sup> November 2001, although it was less so compared to security and rights evaluation.

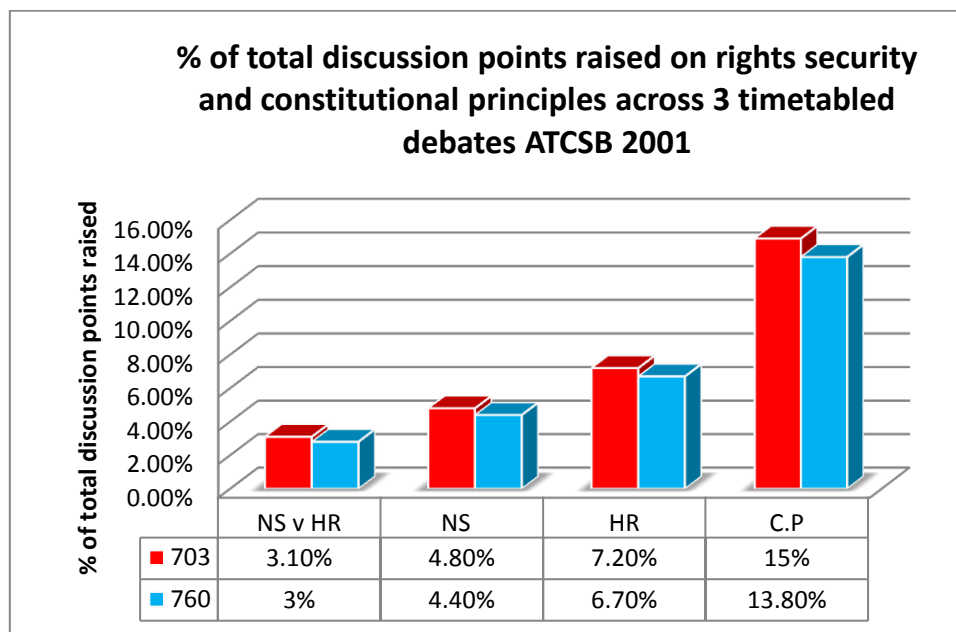


Figure 2

Just as important as the discussion that took place is the number of MPs involved in discussions. If all debate in favour of security provisions came from just one MP this would obviously dilute the strength of the claim. The ATCSA appears to have been substantive in speakers at each debate. Unsurprisingly, there were three key speakers in every debate; David Blunkett from the Labour party, Oliver Letwin from the Conservative party and Simon Hughes from the Liberal Democrats.

### **Conclusion:**

From what has been examined here, it is evident from the data that there is an awareness of the importance that rights and security play in validating legislation. Based purely on the statistical evidence it is possible to confirm that, although security and rights together played a significant role in the early stages of debate this decreased dramatically following the second reading with a shift in parliamentary focus onto the protections demanded by constitutional principles.

### **3.2 The PTA 2005:**

**22<sup>nd</sup> February 2005** – Bill introduced to commons floor

**23<sup>rd</sup> February 2005** – Second reading of the Prevention of Terrorism Bill

**28<sup>th</sup> February 2005** – Committee and Remaining Stages of Prevention of Terrorism Bill

**09<sup>th</sup> March 2005** – Consideration of Lords' Amendments

**10<sup>th</sup> March 2005** – Consideration of Lords' Amendments

**11<sup>th</sup> March 2005** – Receives Royal Assent

The PTA 2005 was introduced in response to the Law Lords ruling in the case of *A and others v Secretary of State (Re A)*.<sup>326</sup> Part 4 of the ATCSA 2001 was declared unlawful and incompatible with the ECHR. The central clause within the PTA 2005 allowed the Home Secretary to impose control orders on individuals suspected of terrorism. This introduction of control orders aimed to satisfy the gap in legislation which had been left by the decision in *Re A*.<sup>327</sup>

One observation from the outset of the Bill was its speed through parliament. Unlike the 33 days of the ATCSA, the PTA took nearly three and a half months to receive Royal Assent. Even with a longer gestation period, concerns were still raised over its speed. Debate held on 28<sup>th</sup> February 2005 raised more discussion points over the speed of the Bill than any other factor, although this was still less than the collective security and rights analysis.

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<sup>326</sup> A review of this case will follow in Section II.

<sup>327</sup> [2004] UKHL 56.

As with the findings on the ATCSA 2001, the same coding remained for the PTA. An accrual of discussion points raised on security and rights are as follows; 22<sup>nd</sup> February 2005 26.8% (18.6%), 23<sup>rd</sup> February 2005 16.4% (14.9%), 28<sup>th</sup> February 2005 16.1% (14.4%), 9<sup>th</sup> March 2005 12.1% (10.8%), 10<sup>th</sup> March 2005 7.5% (6.9%). The chart below (Fig 3) demonstrates how security and rights discussion was weighted across the debates.

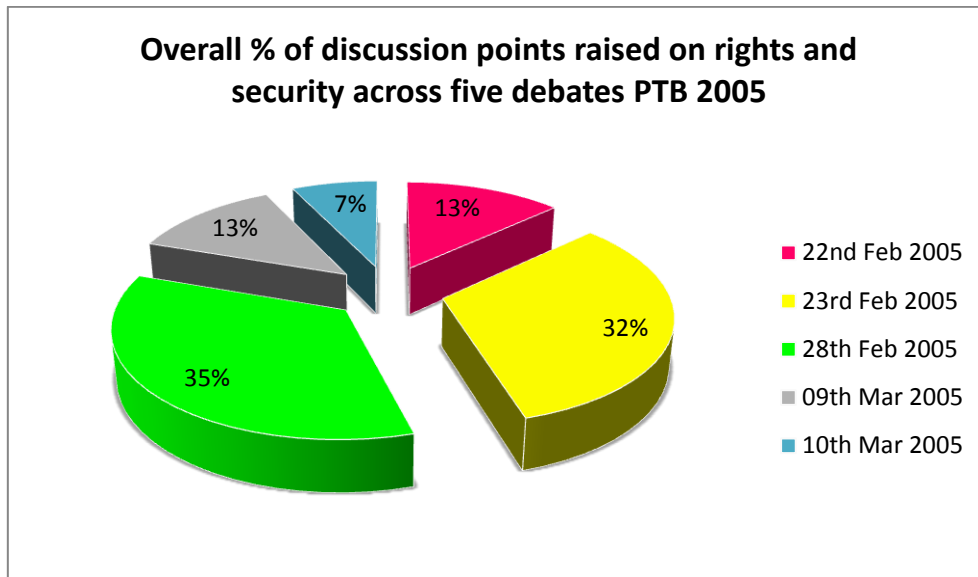


Figure 3

It is possible to identify from this chart that over two thirds of the discussion points raised on security and rights issues took place during the second reading and the review of the committee stages. Less than a quarter of the points raised were as the result of the amendments presented by the House of Lords. This may indicate that either the House of Lords did not choose to address the issues surrounding rights and security or that the House of Commons chose not to address suggested amendments. A greater number of debates took place compared to the ATCSA which may distort how some of the percentages fair if compared against one another. Unlike the second reading of the ATCSA it was discussion following the committee stages which generated the largest number of rights and security discussion points.

As can be seen from the data below (Fig 4), there is a clear peak in the middle of discussion. A peak such as this would be expected at this point where debate on concerns was still fluid and less isolated to resolving the finer details of legislative wording. The dip following the amendments stage would likely fill the void and focus more specifically on the legality



issues. This dip also reflects a similar pattern to that observed in the analysis of the ATCSA. This also follows the understanding by Tolley regarding the lack of legal expertise in the Houses of Parliament which arguably places limitations on legislative review.<sup>328</sup>

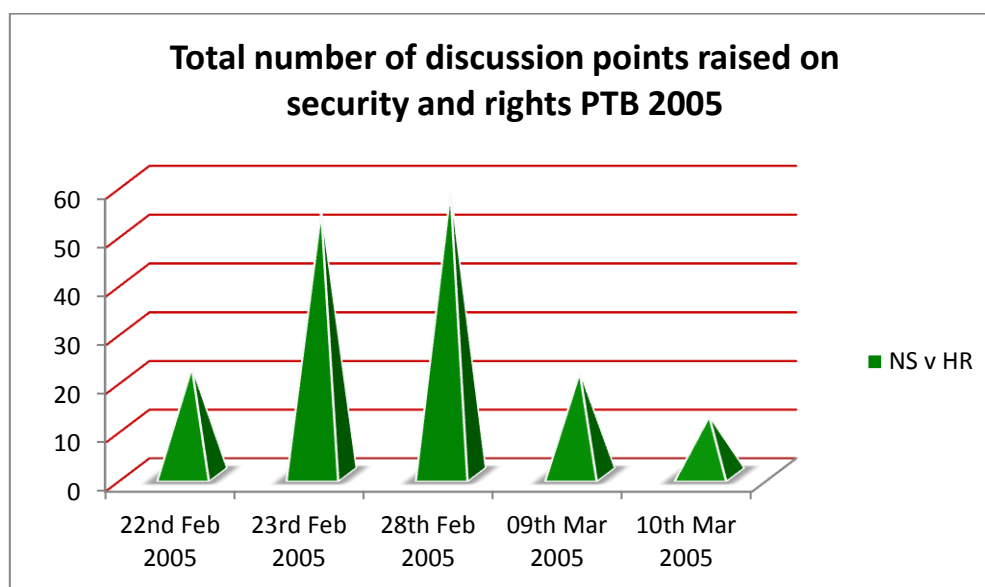


Figure 4

Unlike the first reading of the ATCSA, there is evidence that debate took place on the 1<sup>st</sup> reading of the PTA (22<sup>nd</sup> February 2005). This immediately raised concerns regarding its content. 82 (118) discussion points were raised of which 26.8% (18.6%) were of a clear rights and security composition. Broken down further both security and rights and rights alone claimed 6.0% (4.2%) of the overall discussion points raised, leaving discussion on security accruing 14.6% (10.1%). This emphasis on security may be the result of the executive's introduction having a greater focus on necessity.<sup>329</sup> As this was the first reading, it would be expected to see a strong case presented by the executive to justify the need for the legislation, particularly in light of the fact that there had yet to be an attack on the UK. Without direct attacks on the UK it may have been harder for the executive to justify its derogation claims.

Discussion on the 23<sup>rd</sup> February 2005 raised 328 (362) discussion points. 16.3% (14.8%) of the overall debate looked at rights and security. When analysed further security issues, as

<sup>328</sup> Tolley, M. (2009); Parliamentary Scrutiny of rights in the United Kingdom: Assessing the work of the Joint Committee on Human Rights.

<sup>329</sup> Over half of the discussion points raised on national security issues were focused on the continuing threat that the UK faces and the necessity of moves.

with the previous debate, was the most substantive of the three themes claiming 7.6% (6.9%). This left rights accruing 5.1% (4.6%) and security v rights 3.6% (3.3%). As with the previous discussion the focus of the security agenda, as presented, was on the 'new and continued threat' the UK faced and this equated to over half of the discussion points raised within security. At a time when mainland UK had not faced attack, and four years after the events of 9/11, it may be considered unsubstantiated to continue to rely on this justification. This, however, is not the place to examine these findings and they will be addressed in the forthcoming chapters.

Discussion on the 28<sup>th</sup> February 2005 raised the largest number of discussion points across all debates on the PTA 2005. Of 359 (401), 17.1% (15.2%) of the discussion points centred around security and rights discussion collectively. Interestingly, this particular debate was the only debate in the period of examination where security v rights emerged as the highest discussion points raised. 7.7% (6.9%) of the discussion points addressed security v rights. Alongside discussion actively balancing rights and security, emphasis was on the differences between restrictions and deprivations of liberty in times of national emergency. 5.0% (4.4%) addressed security issues focussing on the 'security' of the people in the UK and the emergence of control orders as a preventative measure. The use of the 'new threat' argument also presented itself in this debate. This was substantially less than seen in previous debates with just two discussion points. Finally, 4.4% (3.9%) addressed rights. This was limited to the impact of control orders on liberties and the role of the HRA in protecting individuals.

Following this debate was discussion on the Lords' amendments. At this stage there was a substantial decrease in the discussion points raised in the debate focused on security and rights. Whilst the two debates were analysed separately they were both timetabled for reviewing amendments and as such will be reviewed simultaneously here. Debate on the 9<sup>th</sup> March 2005 accrued 12% (10.6%) compared to the 10<sup>th</sup> March 2005 which accrued 7.4% (6.8%). As a result of the reduction in focus on security and rights issues, discussion on the introduction of sunset clauses emerged with the greatest number of discussion points raised.<sup>330</sup>

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<sup>330</sup> 10.4% of the 09/03/05 and 21.3% on the 10/03/05.

The emphasis of this research is to ascertain the balance, if any, that is undertaken within the legislative process between security and rights. Whilst trying to extract those findings, gaps in the analysis surfaced. Examined previously in the assessment of the ATCSA, it is apparent that the largest theme to emerge was debate on constitutional principles. The impact of the discussion points is best demonstrated through the graph below (Fig 5).

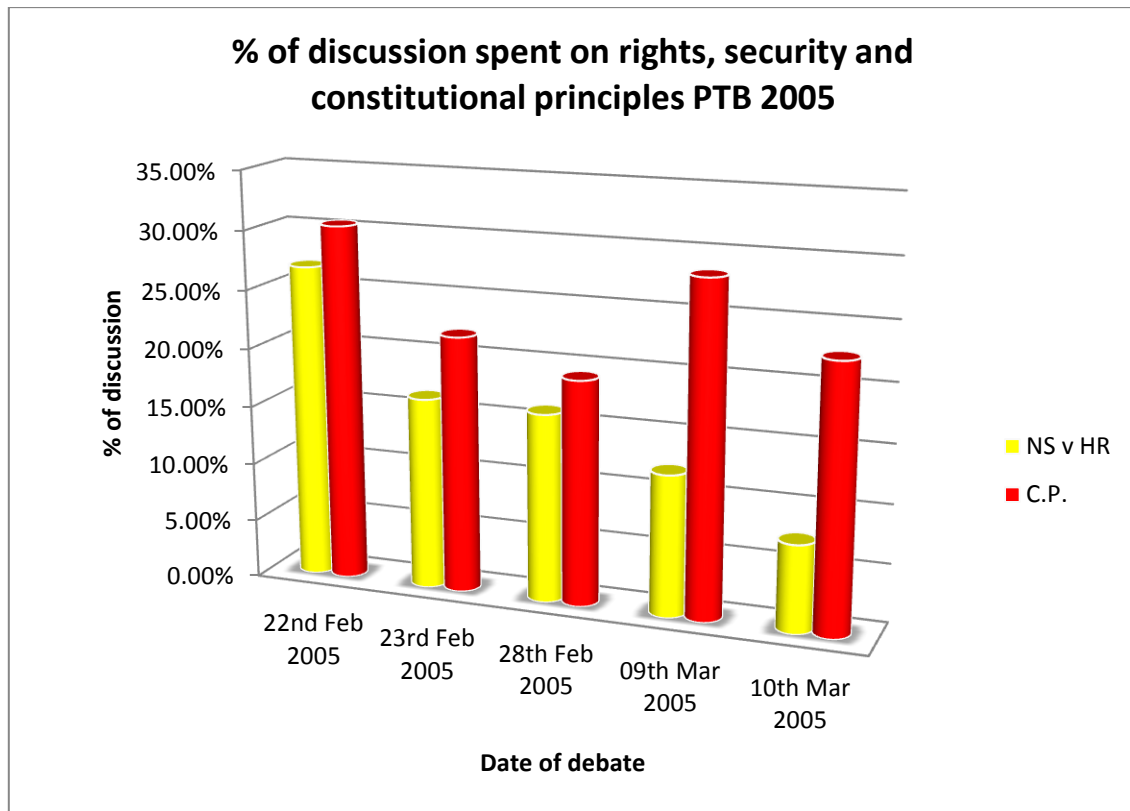


Figure 5

As demonstrated, constitutional principles were dominant throughout the debates but held significant prominence in the debates following the House of Lords review. Even though the debate on the 10<sup>th</sup> March 2005 showed the largest gap between discussion points collectively, it was the first reading where emphasis on constitutional principles dominated gaining a higher percentage of debate than security and rights. These findings would suggest that the significance of constitutional principles remained particularly high on the agenda

for MPs during discussion and a concept to be further discussed. In a presentation of overall percentage of debate accrued, the results provided demonstrate the following (Fig 6):

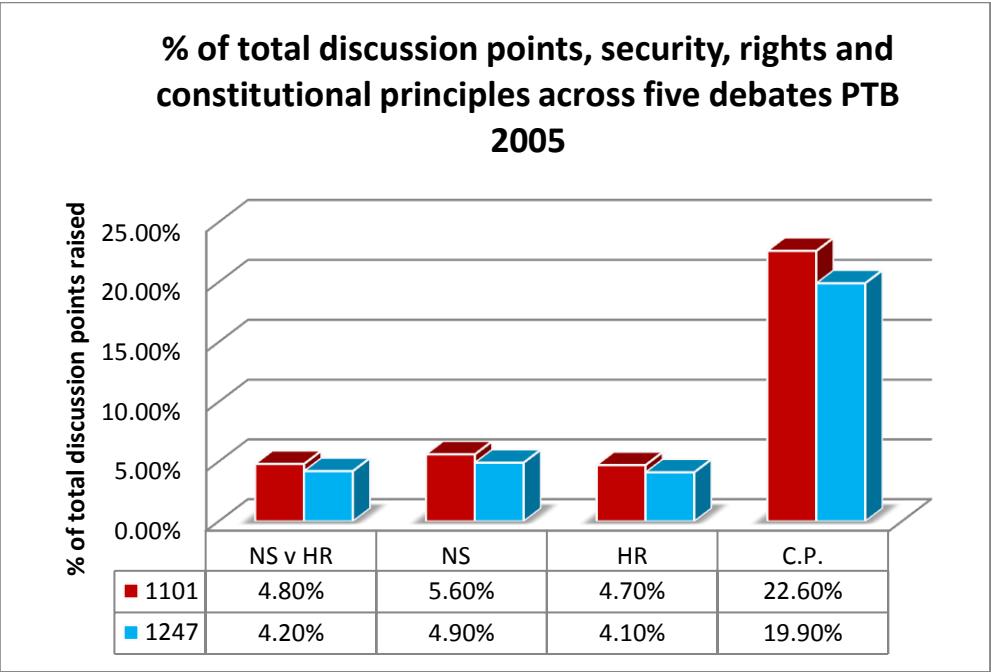


Figure 6

It is imperative to remember that in all the statistical data found here, each debate has different thresholds for length and type of debate. With this in mind, comparisons cannot necessarily be drawn or inferences made about the nature of the debate. What can be identified are trends and patterns which may be evident from the data presented here. Having reviewed the ATCSA 2001 and the PTA 2005 the next move is to examine the TA 2006.

### **3.3 TA 2006**

**13<sup>th</sup> October 2005** – 1<sup>st</sup> Reading of Terrorism Bill

**26<sup>th</sup> October 2005** – 2<sup>nd</sup> Reading of Terrorism Bill

**02/03 November 2005** – Consideration in Committee of Terrorism Bill

**09<sup>th</sup> November 2005** – Report stage on Terrorism Bill

**10<sup>th</sup> November 2005** – Third Reading of Terrorism Bill

**15<sup>th</sup> February 2006** – Consideration of Lords' Amendments

**16<sup>th</sup> March 2006** – Consideration of Lords' Amendments

**30<sup>th</sup> March 2006** – Bill received Royal Assent

The TA 2006 was brought to the house following the London bombings in July 2005 (7/7). Some of the conditions incorporated were considered a necessary response to the unprecedented threat faced by the UK in recent times, although not necessarily as a result of 7/7. Shortly after 7/7 Tony Blair, in a monthly news conference, explained;

‘There will be new anti-terrorism legislation in autumn. This will include an offence of condoning or glorifying terrorism. The sort of remarks made in recent days should be covered by such laws. But this will also be applied to justifying glorifying terrorism anywhere, not just in the UK’.<sup>331</sup>

As with all previous discussions the same coding process was applied. Debates on the TA 2006 ranged substantially in length and discussion raised. The largest debate hosting 542 (2/3 November 2005) discussion points compared to the smallest raising of 43 points (16<sup>th</sup> March 2006). This makes comparative study between the groups significantly harder and reiterates the need to view each debate separately, examining the role of security and rights independently. An accrual of discussion points raised on security and rights was as follows. 26<sup>th</sup> October 2005 28.1% (22.8%), 02/03 November 2005 5.4%(5%), 09<sup>th</sup> November 2005 9.5% (8.2%), 10<sup>th</sup> November 2005 15.5% (13.7%), 15<sup>th</sup> February 2006 15.4% (11.2%), 16<sup>th</sup>

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<sup>331</sup> [http://en.wikipedia.org/wiki/Terrorism\\_Act\\_2006#Progress\\_of\\_the\\_bill\\_through\\_Parliament](http://en.wikipedia.org/wiki/Terrorism_Act_2006#Progress_of_the_bill_through_Parliament) (Accessed 05/08/05).

February 2006 18.4% (16.2%). The chart below (Fig 7) demonstrates how security and rights discussion was weighted across the debates.

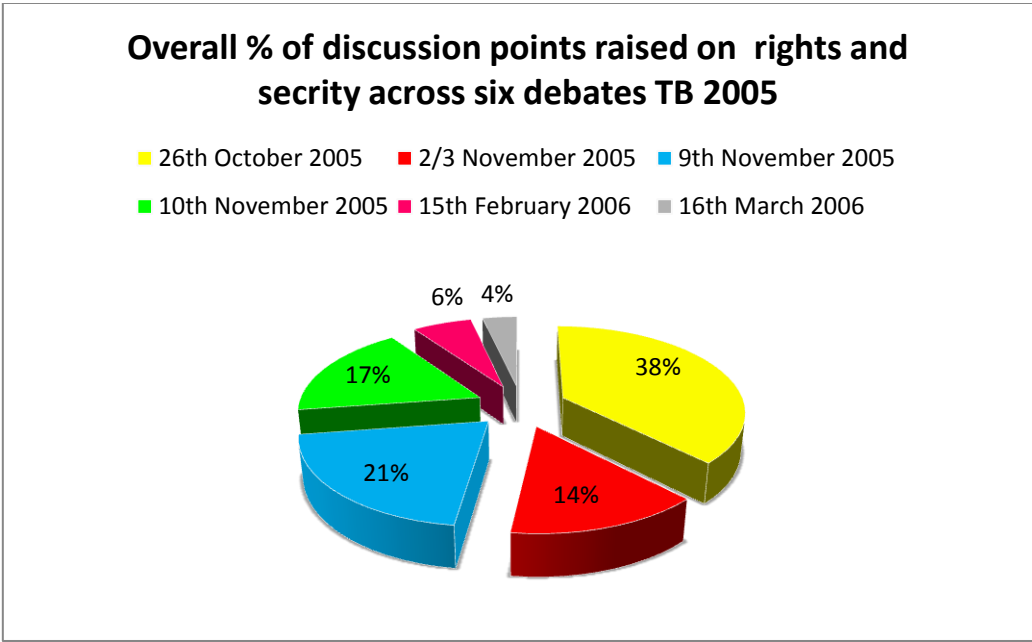


Figure 7

The TA 2006 received a greater number of debates than the previous legislation examined and extended across a longer gestation period.<sup>332</sup> From the chart above it can be seen that over a third of the discussion points raised on rights and security were discussed in the second reading of the debate.<sup>333</sup> This is in line with the percentage equated in the first stages of the previous legislation reviewed in this chapter. In line with the other terrorism legislation examined in this chapter, less than a quarter of the discussion points on security and rights were raised as the result of the amendments recommended by the House of Lords.

The findings from this examination run contrary to expectations. Having been introduced post 7/7 it was anticipated that emphasis would be placed on the security agenda in response to public demands. These public demands had been identified by the ‘YouGov’ poll which demonstrated a 72% support for the 90 day detention but the outcome of this legislation runs counter-intuitively to this. In line with our focus on rights and security the

<sup>332</sup> Gestation lasted 5 months.

<sup>333</sup> It is important to note that there was no first reading debate to analyse with this TB 2005 similar to that of the ATCSA 2001.

graph below (Fig 8) demonstrates the number of discussion points raised on security and rights across the debates. This graph has been incorporated to demonstrate the number of discussion points raised, hopefully giving the reader a clear image of the spread on the discussion.

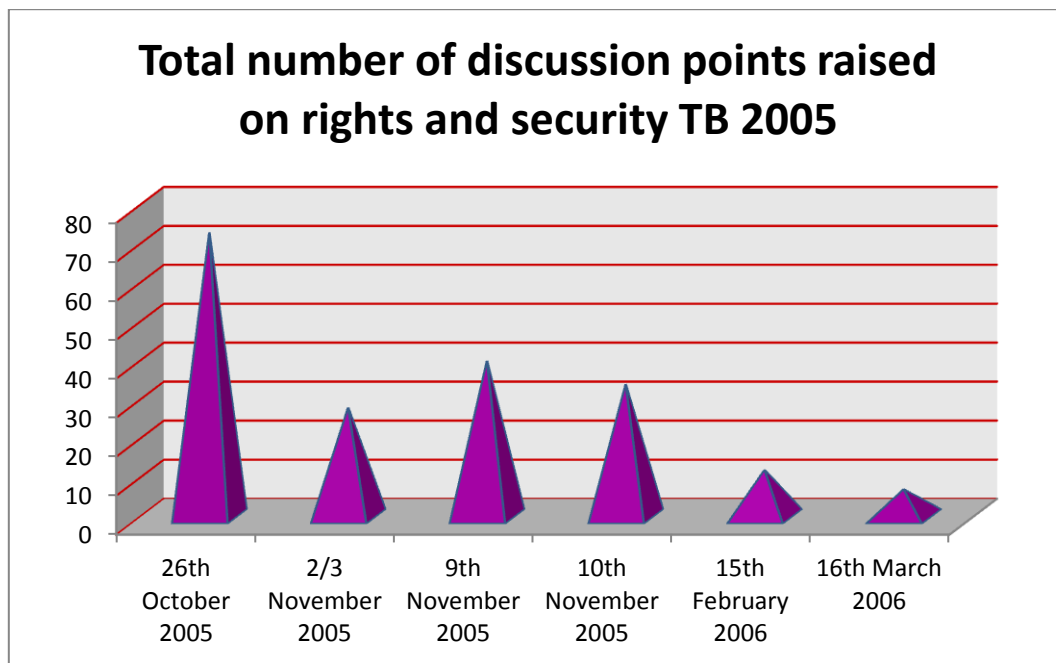


Figure 8

From this graph it can be seen that the discussion points raised at the second reading proved the most fruitful regarding points on rights and security, with a similar percentage to that experienced in the examinations. Discussion focused on the question of 90 days pre-charge detention, the reduction to 28 days detention and the introduction of a sunset clause. One of the problems encountered in this debate was under which theme certain discussions stood as documented in the examination of the PTA 2005. This was particularly problematic when analysing where the discussion on sunset clauses stood. Depending on the interpreter of the discussion, sunset clauses are pigeon-holed differently. On one hand they favour security by agreeing to the legislation for one year yet on the other hand they protect rights and liberties by ensuring that these constraints are reviewed. Another school of thought is that they best represent the workings of the constitutional framework by placing the executive under parliamentary scrutiny. Due to the complexities in allocating a theme, sunset clauses were identified as a standalone issue.

Discussion on the 26<sup>th</sup> October 2005 raised the most discussion points in the rights and security assessment. This was due to the substantial concern raised over the impact of 90 days pre-charge detention of individuals. Of the 73 discussion points raised 38 (52%) of them were on rights related concerns with 34.2% of the overall discussion points on the 26<sup>th</sup> October 2005 focusing on concern for the 90 pre-charge detention clause. Security discussion points collected 17 (23.2%) and security and rights collected 18 (24.6%). With this in mind, a reduction in this is likely to be inevitable following the reduction in the pre-charge detention clause from 90 days to 28 days. As mentioned earlier, it was anticipated that in a post 7/7 environment greater focus on security and the protection of the individual may be apparent. This lack of emphasis on security, even with the YouGov figures demonstrating public support, raises questions over the rationale for the moves undertaken by MPs to resist 90 day pre-charge detention. More interestingly was the decision to vote against party lines and the party whip, a position which will be considered further in Section II.

Following this debate, the house discussed the committee stages of the Bill on the 2<sup>nd</sup>/3<sup>rd</sup> November 2005. Similar to the rest of the debate, there was limited focus on rights and security and emphasis focused on the glorification of terrorism and the lack of justification for the 90 day pre-charge detention. Particular focus was placed on the unnecessary nature of the legislation and the catchall clauses found within it.<sup>334</sup> Of the 451 discussion points raised across the two days only 28 (6.2%) fell under the security and rights theme. Rights received the biggest percentage of this with 3.5% (2.9%) identifying the problem on 90 days detention in line with the ECHR. Security received 1.9% (1.6%) referencing primarily the new and continued threat including the events of 7/7. The remainder of the discussion points raised 0.6% (0.5%) and belonged to the balance between the infringements of 90 day detention on rights compared to the impact on security.

The 9<sup>th</sup> November articulated the report stage with 416 points raised. 34 (8.1%) points were raised under security and rights. Broken down further; security v rights collected 8 (1.9%), rights 11 (2.6%), and security 21 (5.0%). Security collected the largest amount based on the

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<sup>334</sup> This was associated with the glorification and encouragement of terrorism to which it was considered that everyone could be found guilty of a crime and that there was too great a margin of interpretation for the particular clause to be effective, proportionate and necessary.



emphasis placed on the events of 7/7 and the need to protect the UK. However, in the scheme of debate this percentage of discussion was minute.

By the third reading, it could be seen that discussion focused on the construction of the content as opposed to the wider socio-political implications. Discussion points raised in this particular debate were less than half of those found in the previous two stages and as a result present higher looking percentages of discussion. Discussion on the 10<sup>th</sup> November 2005 saw only 34 (16.3%) discussion points raised as security or rights issues. Particular emphasis in this reading returned discussion to the nature of threat and the new threat faced by the UK, with security collecting 6.7% (5.7%) of the discussion points. Rights again focused on the protections of the individual and the parliamentary duty to protect these claiming 4.8% (4.0%). In the balance between security v rights this debate interestingly balanced the rights of the suspect against the rights of the victim. This only raised two discussion points but nonetheless forced the House to consider pre-emptive action which, as identified in the previous chapter, is a well-established principle available to be utilised by a state. Overall the security v rights, debate raised 4.8% (4.0%) of the overall discussion points raised.

The following two debates took place over three months after the introduction of the legislation to the House. As could be seen from the graph above there was a continuing reduction in the number of discussion points for these two debates which both considered the Lords' amendments. The 15<sup>th</sup> February 2005 raised only 12 discussion points within the security and rights agenda. This reduced further on the 16<sup>th</sup> March 2006 to just seven discussion points raised. As both of these debates focused discussion on the Lords' amendments, it may be that the reduction in discussion on rights and security was the result of a pre-determined agenda to work through. The substance of both debates centred on the implications of the glorification clause and the similarities already identified with the incitement laws. If this decrease in attention of security and rights discussion is compared with the previous two acts reviewed then the trends are similar, reflecting a normal course of events; it may also be the result of amendments having already been implemented in the earlier stages.

What is interesting about this discussion is the difference it presents to the findings of the previous legislation examined. In previous examinations, constitutional principles played a prominent role in the discussion points raised. This was not the case in this debate. As the contextual analysis in the next chapter will demonstrate there was, in this debate, a greater emphasis on the requirement for justification than seen previously. The following graph (Fig 9) demonstrates the difference between security and rights discussion points compared to those on the constitutional principles for the TA 2006. Each column identifies the percentage of discussion points accrued within each debate.

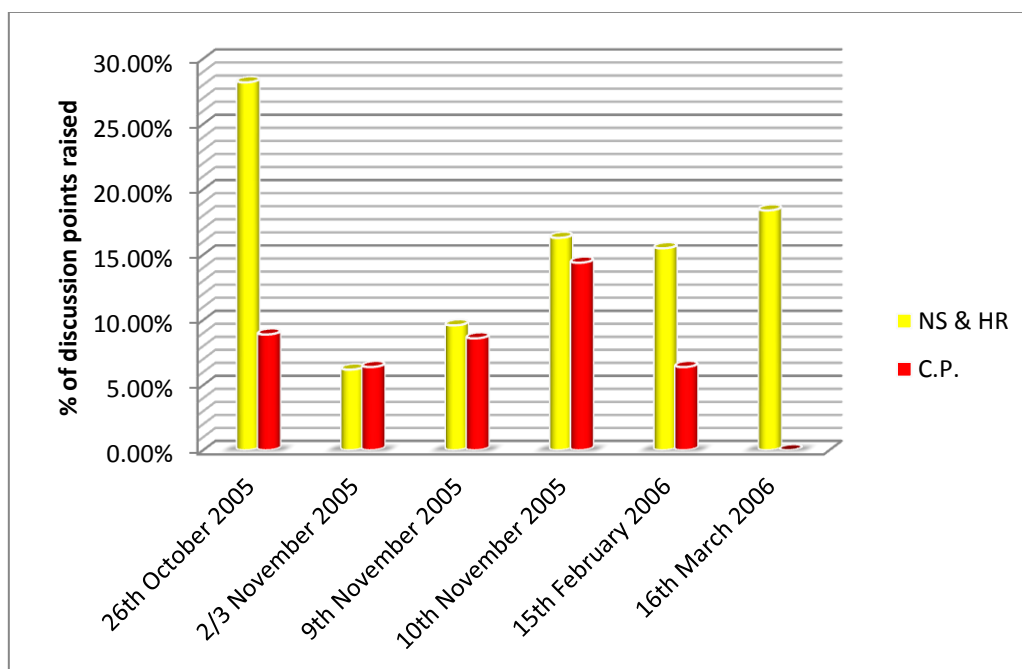


Figure 9

Even though independently constitutional principles appear to have demonstrated lesser impact on the previous graph, as can be seen overall, the constitutional principles system raised the greatest number of discussion points. This is based on the group of 'National Security and Human Rights' being broken down into the three subject headings that were collaborated to form it. As is evident from the graphs, collectively rights and security have accumulated a larger percentage of discussion points.

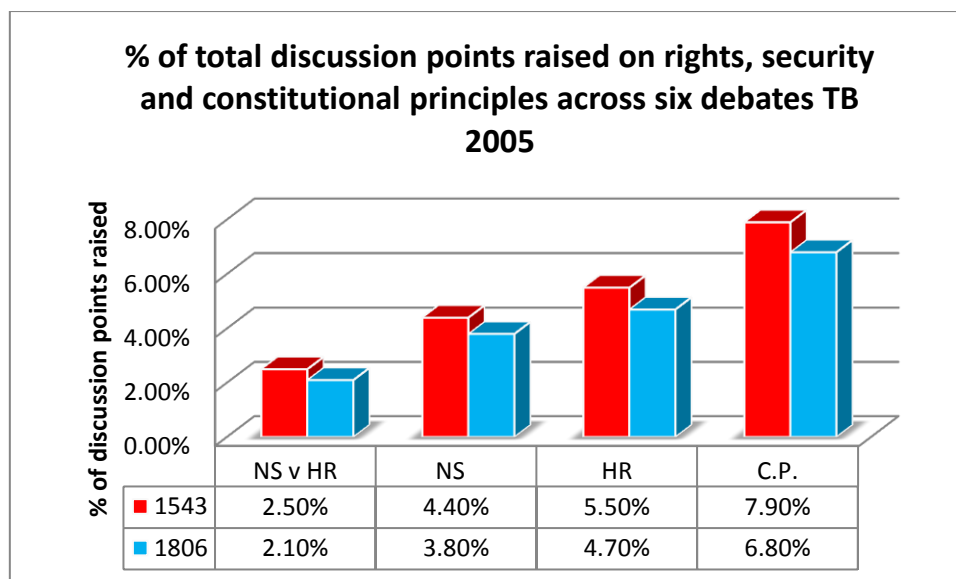


Figure 10

As mentioned previously, it is vital to remember that the statistical analysis from each debate has a different threshold for length and type of debate. With this in mind, findings from the discussion on the TA 2006 cannot necessarily be equated with those of previous debates. It is, however, possible to identify trends and patterns that may exist from the data available.

Outside of the influence of constitutional principles and rights and security, debate engaged a wider socio-political dimension. The focus of this thesis, therefore, was not a standalone issue and as such, may have been influenced by external political discussions and other areas of legislative debate. To ground some of the wider political, global and social influences a number of external discussion points will now be reviewed. Each of the debates was coded in line with the information presented above.

### **3.4 Other Legislative Themes:**

A further two legislative areas and nine political discussion topics have been included in this analysis.<sup>335</sup> These have been included to see if outside of terrorism legislation there is a consideration for a security and rights agenda. In line with media framing and public opinion on terrorism and the 'new threat' the UK faced, it was anticipated that justification based on

<sup>335</sup> The group of miscellaneous was not examined as it was deemed that there were no trends to infer from this group.

security may have played a greater role than it did. The areas discussed are only provided to offer a supporting framework to the examination of terrorism legislation.<sup>336</sup>

The two legislative areas to be examined further are immigration and asylum legislation and debate on ID cards. A brief background to these will be provided in line with the discussion on terrorism legislation. However, as mentioned earlier, the examination of these areas will be less detailed than presented previously. These areas may be referred to in later chapters but emphasis for this research continues to lie in the balance between security and rights in anti-terror legislation. Each collaborated area of political discussion (as identified in the introduction to this chapter) will be presented identifying the four themes examined in the findings of terrorism legislation and namely; security v rights, security, rights, and constitutional principles. The statistics and figures identified in these assessments have been subject to the same rigorous coding system as the preceding assessments. The first of the two legislative areas to be reviewed will be ID cards.

#### **3.4.1 ID cards:**

In July 2002, the Government launched a consultation on 'Entitlement Cards and Identity Fraud'. The consultation period lasted until 31<sup>st</sup> January 2003. A summary of findings from the consultation exercise was published on 11<sup>th</sup> November 2003. At the same time as the publication of the findings, the government announced its decision to build a base for a compulsory national identity cards scheme. A draft Identity Cards Bill was published on 26<sup>th</sup> April 2004. Consultation on the draft legislation ended on 20<sup>th</sup> July 2004 and in November 2004 the Identity Cards Bill was introduced into the House of Commons. The Bill had reached its second reading in the House of Lords when parliament was dissolved on 11<sup>th</sup> April 2005 for the general election and the Bill fell. There is currently no legislation providing for UK identity cards.

The debate on ID cards is included in this research due to the anticipated emphasis on the rights v security debate. There have been a number of discussions which have been examined that were not necessarily centred on the legislation but were in the pre legislation debates. This helps format some of the opinions which may emerge throughout the discussion.

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<sup>336</sup> The areas of discussion emerged following the initial coding process as identified in the methodology.

In line with the other examinations undertaken, 18 debates and 889 (992) discussion points were identified. The single biggest issue to emerge out of the debates throughout the period examined was discussion over cost. This does not feature as a theme of this thesis to review further but has been acknowledged here to alert the reader of the substantive issue discussed. All areas of review were addressed in the discussion on ID cards. Security v rights collected 1.5% (1.4%) of the overall discussion points and security collected 2.1% (1.9%) with particular emphasis on the cards being used to prevent terrorism, whilst constitutional principles received the lowest number of discussion points with 1.3% (1.2%) looking at the lack of parliamentary scrutiny. Rights emerged top in this field establishing 3.7% (3.3%) of the discussion points raised. Discussion focused on the infringements such measures would have on the lives of individuals living in the UK.

ID cards raised discussion on balance between the individual and the state and particularly the balance of power and control between the state and the individual (a position not explicitly identified in the other debates reviewed). On the 20<sup>th</sup> December 2004, this particular discussion claimed 4.0% (3.6%) of the total discussion points raised. This balance is important as it demonstrates that, when considering the subversion of rights, the elected body explicitly represented the principle of balance of power and concessionary rights of the individual, challenging the notion of 'how far is too far'. As outlined previously, whilst this legislation was not anti-terrorism legislation, any response made to any situation must be proportionate to the need; this proportionality falling in the balance of power between the state and the individual.

Discussion on ID cards seemed to raise a number of shorter discussions than the other legislative areas. This may be a result of the Bill failing to pass successfully through the House. None of the issues raised in these smaller debates were new concepts and their limited discussion may therefore be simply the result of reaffirming debate. A full examination of this legislation was not undertaken as debate fell outside of the timeframe examined for this thesis.

### 3.4.2 Immigration and Asylum legislation:

The Minister of State for Citizenship, Immigration and Counter-Terrorism announced proposals for asylum reform in October 2003. In the outline for reform the legislation aimed to streamline the immigration and asylum appeals process and deal with undocumented arrivals. It further aimed to deal with situations where it was deemed that a country other than the UK was best placed to consider someone's asylum or rights claims substantively. It also aimed to enhance the powers of the OISC. By 2006, in a post 7/7 UK, the Immigration, Asylum and Nationality Act built upon two published government proposals; 'Controlling our borders: making migration work for Britain' and 'Confident communities in a secure Britain'. The government maintained that the key provision of this strategy was primary legislation and these Bills were both considered in providing transparency to the immigration system.

The debates examined are not simply focused on the legislative debates but on any debates or questions to the executive that discussed immigration or asylum.<sup>337</sup> Three pieces of immigration legislation received Royal Assent during the period of examination; these were the Immigration Act 2002, Asylum and Immigration Treatment of (Claimants) Act 2004 and the Immigration and Asylum Act 2006.<sup>338</sup> It was anticipated that a number of issues would be raised around security and rights as the result of media hype.<sup>339</sup>

Of the 26 discussions analysed, 23 of the debates raised no issues associated with rights or security.<sup>340</sup> This is particularly interesting as academics, such as Huysman, have claimed that in a post 9/11 world the government had placed fear and insecurity on the links between terrorism and asylum.<sup>341</sup> If this is so then it would be expected that a significant number of debates analysed would have associated the moves with security measures. As mentioned

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<sup>337</sup> These include questions to the executive, some of which raised less than 20 discussion points. These have been included to provide a fuller picture of the Bills process.

<sup>338</sup> For in-depth examination on the influence of immigration in the post 9/11 anti-terrorism debate see: For similar process in coding see Huysmans, J and Buonfino, A. (2008); 'Politics of expectation and Unease: Immigration, Asylum and Terrorism in Parliamentary Debate in the UK'.

<sup>339</sup> See HC Vol.392, Col. 167, N. Gerrard.

<sup>340</sup> 04th February 2002, 05th February 2002, 07th February 2002, 24th April 2002, 24th February 2003, 28th April 2003, 16th June 2003, 14th July 2003, 28th October 2003, 17th December 2003, 19th January 2004, 23rd March 2004, 22nd March 2004, 22nd March 2004, 14th June 2004 (3 debates), 15th November 2004, 20th December 2004, 20th December 2004, 07th March 2005, 07th November 2005.

<sup>341</sup> Indeed the introduction of legislation to the house was by the Secretary of State for Citizenship, Immigration and Counter Terrorism.

earlier, not all of the discussions examined were substantial in content and in some cases have been simply a question put to a minister. Rather than the fear or threat to security that immigrants and asylum seekers present, the emphasis focused considerably on the drain on the state and resources. This included pressure on local communities, education, GP facilities, the location of removal and detention centres, and most substantially, the cost of the process. This theme ran throughout all discussion on immigration and asylum. Overall there were 8 substantive debates on Immigration and Asylum legislation with 1120 (1275) discussion points raised. A very small percentage of these discussions attracted attention from the themes assessed on security and rights or the constitutional principles. Security v rights accrued 0.5% (0.4%), security 1.1% (1.0%), rights 0.2% (0.2%), and the constitutional principles 2.8% (2.5%). The primary focus within constitutional principles was the need for judicial review in deportation and removal. The link to judicial review was also connected with the ability to provide a check and balance on the executive.

### **3.5 Areas of Political Discussion:**

Whilst the focus of this research falls on security and rights within anti-terrorism legislation, following extensive coding of all related debate throughout the six year period it was felt a wider examination of socio-political debates may help identify influences outside of the anti-terrorism debate. Each of the following paragraphs will explore an area of socio-political influence in brief outlining the same themes as earlier but will be more concise in its representation.<sup>342</sup>

#### **3.5.1: Terrorist attacks:**

Throughout the period examined there were a number of terrorist attacks which received examination through the commons.<sup>343</sup> Eight debates were reviewed and 586 (676) points raised. No issues were raised solely on rights but 0.3% (0.2%) of the debate did examine the conflicts between the HRA and security provisions. It may be expected that in the aftermath of terrorist attacks focus may be placed on security, based on the emotive nature of the discussion. 2.9% (2.5%) of the discussion points focused on constitutional principles and the

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<sup>342</sup> As with the legislation relied upon the areas of discussion emerged following the initial coding process as identified in the methodology.

<sup>343</sup> These included Bali, Istanbul, Madrid and London.

need to preserve democracy in times of perceived or potential threat, whilst bringing justice to the people of the nations who had been affected but also to those committing the acts of terror. 5.8% (5%) focused on the protection of nationals and the continued threat the UK is under; the threat raised as a result of the terrorists' attacks overseas. Outside of the key themes, considerable emphasis was placed on the 'War on Terror' and the links with intelligence agencies in the UK.

### **3.5.2: Defence of the World:**

In a separate category, defence of the world was reviewed. This was on the premise that threat assessments may have emerged in this debate which could influence later decisions. Across five debates 672 (807) discussion points were raised. Emphasis centred mainly on the rationale for war, examining both Iraq and Afghanistan. Both these wars, however, were reviewed separately and presented to the house under those headings. Neither security v rights, nor rights were discussed in these debates. Constitutional principles examined the need for justice, democracy and diplomacy in dealing with the legality of war accumulating 2.2% (1.8%). As with the other debates briefly examined here security secured the largest number of discussion points. Emphasis continued to focus on the new threat and the new challenges that face the UK accruing 2.8% (2.3%) of total discussion points.

### **3.5.3: War in Afghanistan:**

Discussion on Afghanistan crossed 41 discussions.<sup>344</sup> 752 (918) discussion points were raised across all debates. Continuing with the same themes, findings identified that security and rights accrued 2.1% (1.7%) with focus on the balance of A3. Security focusing on the threat to the UK from terrorism accrued 2.6% (2.1%). Rights as a concept did not accrue any discussion points, with constitutional principles accumulating just 1.3% (1%) of the discussion points raised focusing on the checks and balances of the house. Afghanistan was reviewed and included based on its association with the 'War on Terror'. It was anticipated that in the political discussion there would be a significant emphasis on the rationale for war, in particular the need to go to war as part of the on-going war on terror, thus engaging security discussion. As evidenced from the statistics, this was not as transparent as

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<sup>344</sup> This included debates on the continued war on terror encompassing the war in Afghanistan fuelling terrorism, and the UK's foreign policy on igniting a backlash.



expected. Emphasis in the debates examined centred on the drugs trade through Afghanistan including poppy cultivation, humanitarian aid, and the capabilities of British Forces and the role of ISAF. Very few of these debates reviewed the impact on and association of the war in Afghanistan with the UK and particularly the impact of security.

#### **3.5.4: Iraq:**

The war in Iraq received significant attention in debate throughout the period of study.<sup>345</sup> 41 debates and questions to the house were reviewed with 2482 (2980) discussion points raised. Neither rights nor rights v security was addressed.<sup>346</sup> Particular emphasis was placed on the nature of war itself addressing issues of cost, armed forces' responses and humanitarian aid. Security did, however, accumulate 2.5% (2.1%) of the discussion points. This was mainly the result of the links between Iraq and terrorism, the threat that the Iraqi regime presented to international security and the threat to the UK from WMD. Even though issues were raised under the security agenda, many of the propositions presented appeared to be counteracted by positions immersed in constitutional principles. 7.6% (6.4%) of the discussion points addressed the legality of war, the nature of pre-emptive attack for dealing with the threat of terrorism and the government's interpretation of UN Resolution 1441. Whilst the war in Iraq was discussed substantially throughout the period examined, and even though it raised a number of discussion points, analysis remains limited as the result of the focus for this piece.

#### **3.5.5: The Middle East:**

In the examination of the debates in the House of Commons, there were a considerable number of debates and questions raised over the situation in the Middle East.<sup>347</sup> 48 separate debates were conducted with 1259 (1525) discussion points raised. The Middle East has been included because of the role the UK has played in the Middle East process and the associated links with terrorism. Of all the themes examined only security raised relevant discussion points. This focused on the threat which the Middle East could present to the UK,

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<sup>345</sup> Debate here included the legality of war and its justifications, and in particular the war on terror and the impact on national security.

<sup>346</sup> Human rights of Iraqi civilians were addressed in the findings; however this thesis focused on human rights associated with the UK. As such they have not been included in this analysis.

<sup>347</sup> This encompassed debates on Israel, Palestine, Syria and Iran with particular emphasis on the justification of road maps and the peace process.

however only accruing 0.2% (0.1%) of the discussion points. Interestingly it is the debate on the Middle East which raised questions over the double standards of the UK towards international terrorism. Particular emphasis on this debate reviewed the UK's position towards the terrorist organisation Hamas and its work alongside them. It also examined the illegality of the wall constructed by the Israelis and the failure of the road map. Observations by MPs noted that, as a result of these two discussions, the UK's condemnation of terror was so limited that it created double standards, undermining its decision to embark on a 'War on Terror', a similar theme to that seen in the discussion on Northern Ireland. The issue resulting from perceived double standards, however, falls outside the scope of review for this thesis.

### **3.5.6: Northern Ireland:**

The UK has suffered for decades at the hands of terrorism, in particular from the IRA.<sup>348</sup> Due to the close relationship between Northern Ireland and the UK, an examination of the discussions on Northern Ireland was undertaken. 48 debates were reviewed and 1095 (1316) discussion points raised. Discussion points raised on the strands of the thesis were limited to national security 0.2% (0.2%) and constitutional principles 0.6% (0.5%). Particular emphasis was placed on the need for decommissioning and the failings of both the Good Friday and the Belfast Agreement. Questions were raised over the rationale for negotiation with known terrorists whilst embarking on war against those known terrorists in Afghanistan. Emphasis was placed by the members of the house to be tough on terrorists and certainly not to be allowing them to enter the democratic process of Stormont. Both the debates raised on Northern Ireland and the Middle East identify weaknesses in the positions put forward by some MPs regarding threat assessment and rationale for the war on terror. By operating double standards (as they are seen by some commenters in the House) the substantive debate on security is certainly weakened, and in turn, may or should increase the discussion on rights standards as a result.

### **3.5.7: The coalition on terrorism:**

Debates on the coalition against terrorism were pulled together and analysed. This selection, in a post 9/11 era, was thought to incorporate debates on security and rights. Six

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<sup>348</sup> This focused on decommission and the implications of terror, crime, negotiations and the role of parliament

debates were analysed and 843 (886) discussion points were made. Security v rights and rights each secured 0.8% (0.7%) of the discussion points. Security accrued 4.3% (4.1%) of the discussion points with particular emphasis on the need to protect citizens and the continued threat faced by the UK. The substance of the theme of constitutional principles centred on the continued need to reinforce democracy and for the necessary legitimate channels to bring about justice to those involved in any terrorist incident. With 7.1% (6.7%) of the discussion points accrued, it is evident that tradition was important in decision making.

### **3.5.8: Defence of the UK:**

Defence of the UK raised 2031 (2437) discussion points across 23 debates.<sup>349</sup> Due to the large number of total points, the percentage of the discussion looks disproportionate but this particular issue raised a substantial number of points comparative to the other discussions in the themes examined in this thesis. Security v rights accrued 1.2% (1%). In line with other debates a number of the discussion points looked at MOUs as a result of Article 3. Rights accrued the smallest number of discussion points of the themes with just 0.2%. This focused on the work of the JCHR and discussion on the grounds that no other nation had derogated from the Article 5. Constitutional principles raised 2.8% (2.3%) of the total discussion points introducing a variety of issues, many on the need for review of the executive and the checks and balances required of a democracy. There was also emphasis on the role of the judiciary and the balance between the executive and the courts. The largest haul of discussion points raised in debate on the defence of the UK was security. Emphasis centred on the threat to the UK and the need to be able to deal with the threat. This threat, as purported in the discussions, comes from extremists, WMD and a-symmetric warfare. 110 discussion points were raised accruing 5.4% (4.5%). Three other areas of discussion were addressed in the defence of the UK. Particular focus was given to the armed forces including resources and deployment, measures for dealing with terrorism and the developing of counter terrorism strategy required within the house. It was not unexpected to see a high percentage of comments associated with security, based on the nature of this debate. The issue of defence would naturally induce such emotive discussion and produce findings like those presented in this brief analysis.

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<sup>349</sup> This included debates on UK capabilities and security development but not legislative capabilities.

### **3.5.9: Terrorism:**

A number of debates were held entitled 'Terrorism'; these were pulled together with the debates on extremism to constitute one category for review. There were 15 debates raised with 327 (405) discussion points made. Security v rights and rights failed to attract any discussion points in these debates. The debates in general examined the impact of war overseas with particular emphasis on intelligence. Discussion on security raised 9.7% (7.9%) of discussion points with emphasis on the threat the UK was facing following terrorist attacks on other nations. Constitutional principles maintained a foothold in the analysis with 5.8% (4.6%) of the discussion. In line with other debates, the focus under this thread was on the need to use the democracy the UK has to defeat terrorism and to maintain that the rule of law is upheld. A deeper examination of this will be reviewed in the following chapter on the contextual findings.

### **Conclusion:**

There appear to be no substantive trends or patterns emerging within these findings. This may demonstrate that there is limited focus on the issues or that concerns are raised elsewhere. The results demonstrate that whilst security v rights exist, it may be considered relatively limited to that expected. This raises the question of how challenges were made to the executive over issues which clearly fell within a security and rights context. Such limited consistency across the assessments, however, may have been the result of executive control over timetabling of events to reduce/limit the ability of parliament to scrutinise the legislation before them.<sup>350</sup> This, as can be seen in Section II, was certainly a concern to be raised with both the ATCSA 2001 and the PTA 2005.

As identified from the data, there was significant emphasis on constitutional principles, which may account for challenges made to the executive not being demonstrated necessarily through a rights/security nexus. Nonetheless, in such a highly emotive and public area of policy, it was anticipated that higher representations would emerge. As will be seen, the influence of the public also dominates and influences a significant quota of debate, particularly when challenges made to executive moves begin to circulate. When looking specifically at a post 7/7 environment, a YouGov poll was commissioned to determine the

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<sup>350</sup> See, Lustgarten, L. (2004); National Security, Terrorism and Constitutional Balance. Pp. 8.

public's view on an increased period of detention. The poll purported to show a 72% support of the 90 days with 22% opposed.<sup>351</sup> It is outcomes such as these discussed which were initially considered to dictate the direction of debate. Following the failing of the 90 day detention in favour of 28 days, Tony Blair was found to criticise parliament identifying a 'worrying gap between parts of parliament and the reality of the terrorist threat and public opinion'.<sup>352</sup>

What is surprising is that it was anticipated that the reports from the committee stages of the Bill may generate a peak in discussion on the draft legislation. This was anticipated based on the specific nature of the committees to identify weaknesses or potential incompatibilities within the draft legislation. From the findings, however, this did not appear to emerge. This may be the result of changes made prior to scrutiny at the recommendations of committee reports although it may also be the result of the wider expectations of the role committees fulfil and the influence which they carry. This is particularly so in the review of the ATCSA where the JCHR had only been operational for a matter of months.

The influence of the political discussions reviewed cannot be overlooked here. The incorporation of this data was provided to demonstrate that significant debate took place outside of the legislative scrutiny stage. This further supports the work of Tolley<sup>353</sup> who suggested that the lack of legal expertise in parliament hinders the real ability to challenge policy. Indeed, in most of the cases presented there were more discussion points accrued than compared with its legislative counterparts although this maybe the result of the culmination of five years of debate. This is a similar story to that told through the presentation of examination of ID cards and immigration and asylum legislation.

Drawing on the statistical findings it is possible to see that, when excluding the category of miscellaneous from the overall figures, the ATSCA 2001 accrued 15.1% for the rights and security theme and 15% exactly for constitutional principles; The PTA 2005 accrued 15.1% for rights and security and 22.6% for constitutional principles; The TA 2006 accrued 12.40% for rights and security and 7.90% for constitutional principles. None of these findings

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<sup>351</sup> [http://www.yougov.com/archives/pdf/DBD050101009\\_1.pdf](http://www.yougov.com/archives/pdf/DBD050101009_1.pdf) (Accessed 20.06.07).

<sup>352</sup> [http://www.yougov.com/archives/pdf/DBD050101009\\_1.pdf](http://www.yougov.com/archives/pdf/DBD050101009_1.pdf) (Accessed 20.06.07).

<sup>353</sup> Tolley, M. (2009); Parliamentary Scrutiny of Rights in the United Kingdom.

identify substantive discussion in the theme of security and rights. Even with the two themes combined, this still fails to attain a third of the overall discussion points. This, as previously pointed out, may be based on the limited time available for discussion which affected the overall number of discussion points raised, potentially distorting the real significance of the debates. It must also be noted that this statistical representation does not account for the duration of discussion on issues of rights, security or constitutional principles. Thus, the substance of discussion is omitted. This is believed to have been a contributory factor in the relatively low reflections on the themes being reviewed.

With the data established, the following section will look at a case-specific assessment with the aim of identifying debate in line with the figures presented here. With the limited findings of the quantitative data, it is important to ascertain the issues raised within the debate to gain a real picture of the balance debate, if indeed one exists.

# SECTION II

## **Introduction to Section II:**

Section I reviewed a variety of legal and theoretical concepts underpinning rights, security and oversight mechanisms prevalent to this study. Following this, a quantitative assessment of parliamentary debate was presented.<sup>354</sup> These findings identified the ‘frequency’ of rights, security and constitutional principles raised within the debates examined through the coding process applied. Whilst the quantitative data provides an overview of the larger picture in the assessment of terrorism, security and rights, the information does not provide the quality of data required to consider the level of debate at a detailed and illuminating level. Section II will provide a detailed examination of particular aspects of three anti-terrorism Bills.

Unlike the quantitative chapter, which provided a wider review of debate associated with discussion on rights and security,<sup>355</sup> the close content analysis of rights and security discussion within parliament has been confined to the ATCSA 2001, PTA 2005, and the TA 2006. One case study from each of these acts has been selected to represent a snapshot of discussion. As identified in the introduction, selection of the case studies relied on satisfying two criteria. The first criterion was that the case study had to have been raised as a concern within the JCHR. This ensured that the case study raised clear concern over human rights issues. The second criterion was that each case study had to reference security by the executive as a justification to warrant the measure discussed.

From the quantitative data, it was established that discussion on rights and security was, in many instances, not the aspect of discussion which was most frequently debated; case studies were not chosen on the basis of the frequency of coding to emerge from Chapter Three. Having already established that rights and security discussion is limited within the debates examined from within the House of Commons, this more detailed content analysis identifies the quality of discussion concerning these issues in relation to the parliamentary review process. To achieve this, analysis incorporates debates from the House of Commons, House of Lords and the JCHR.

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<sup>354</sup> See Chapter three for an in-depth account of methodology and selection of debate procedure.

<sup>355</sup> These included debates on Afghanistan, domestic terrorism and the Middle East. See Chapter Three for full review.



The first case study to be reviewed will be the ATCSA 2001. The focus of this case study is on the necessity of derogation from the ECHR as the result of Part 4 clause 21-23 ATCSB 2001 legislating for potential indefinite detention of non-nationals suspected of terrorism. It was argued that such measures were essential based on the constraints placed on the UK by Article 3 ECHR.

The second of the case studies focuses on the introduction of control orders within the PTB 2005. The PTB 2005 emerged following the decision in the case of *A v. Secretary of State (Re A)*<sup>356</sup> where the House of Lords held Part 4 of the ATCSA 2001, which provided for detention without trial of foreign nationals only, to be incompatible with the ECHR. Presented as an alternative to detention without trial under section 23 of the ATCSA 2001, individuals could be placed under control orders irrespective of nationality.

The final case study looks at clause 23 of the TB 2005. This reviews discussion over the inclusion of 90 day pre-charge detention for terror suspects in the Bill stages and its subsequent reduction to 28 days following debate.

The chapters found within this section adopt a thematic rather than chronological approach to this examination. This approach aims to offer as clear an analysis as possible. The thematic approach aims to strengthen this analysis based on the consideration that the lack of structure identified within the debate appears to be a fundamental hindrance in the interrogation of executive measures by parliament. It is hoped that by adopting this thematic approach, a clear and concise examination can be provided.

The aim of this section is to identify patterns and examine any trends, relationships, generalisations and omissions. Due to the volume of discussion assessed, it is impossible to recount the individual stance of every MP, Lord or committee presented within debate.<sup>357</sup> This assessment, therefore, draws out themes and trends which emerged and identifies whether others are omitted from debate. In all three case studies, responses by the Home Secretary and the Secretary of State are considered to represent the views of the executive.

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<sup>356</sup> [2004] UKHL 56.

<sup>357</sup> Not only due to the constraints of this research but also to avoid replication of verbatim debate which can directly be found through Hansard.

Before moving on to the examination of the case studies, there are a few overarching issues which need to be discussed. From Chapters One and Two, it is evident that there remain a number of uncertainties within the understanding of concepts such as rights, security and the practicalities of oversight mechanisms in the law-making process. One observation, particularly from within the House of Commons, is the assumption of the 'right' of security often used to justify 'collective' security.<sup>358</sup> While security of the individual is explicitly protected, 'collective security' is not a 'right' in the pure legal, sense. It is, however, one of the 'interests' which states can use to contain some rights.<sup>359</sup> As examination into parliamentary debate unravelled, there is the appearance of an amorphous acceptance of collective security as a right seemingly given the same, if not superior, status to individual rights. This apparent misinterpretation may underpin the problem that, as non-lawyers, MPs may fail to grasp the complex legal issues and orchestrate discussion from a socio-political perspective. Thus, it is not validated at this stage that whilst challenging the Bill the critic avoids engaging in its complex legal considerations which could unravel the legislation at a later date. In adopting this position, by supporting 'collective rights' through security measures, individual rights protections may suffer. This is further advanced by the proposition of Cotler and Ruddock who advocate a notion of 'human security' to bridge the gap between the individual rights protection as already afforded and the wider political influence of protecting the 'majority' or the minority by establishing the collective security principle.

As mentioned in chapter one of this thesis, a major omission from the debate in parliament and therefore from this thesis is any discussion, or even a mention of committees and materials other than the JCHR, and, in particular, the findings of the Home Affairs Committee. The Home Affairs Committee published a number of important and intellectually rigorous reports addressing the advancement of Anti-terror legislation making recommendations based on the quality of the legislation presented, the need for continuous independent review of Anti-terror legislation and the scrutiny legislation receives as a result

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<sup>358</sup> Note that this observation refers to collective security as protection of national security as opposed to the notion of 'collective security' often associated with the attempts to preserve the security of each state which has come together against a common enemy.

<sup>359</sup> E.g. second para of Arts 9-11.

of the speed through which legislation can be passed through parliament.<sup>360</sup> With this backdrop, it was expected to see reference to these reports within the debate, shockingly, this was not so. As this is a contextual analysis of political discourse of law making in Anti-terror legislation, the remarkable absence of explicit discussion of the findings of the Home Affairs Committee omits them from the case studies, but will be returned to in the conclusion.

A further consideration, which needs briefly to be raised, is the influence of previous case law as a guiding principle in the law-making process. Chapter Two identified the potential disparity between oversight mechanisms in the UK. Although it has been suggested that parliament initially establishes necessity and proportionality of measures, previous case law indicates that the judiciary then transfer the acceptance of this necessity and proportionality into a balance between rights and security, providing another layer to the assessment of measures ingrained within anti-terror legislation. Whilst historically it has been documented that the executive have access to intelligence which may best place them to decide the grounds, the incorporation of the HRA has widened the scope of the judiciary, substantiated by the decision in *Re A*. As noted earlier, the case of *Re A* was a trigger for the PTA 2005. In *Re A* the AG, on behalf of the Executive, relied on a number of cases to warrant their decision in creating Part 4 of the ATCSA 2001. As such, a brief synopsis of each of the cases relied on in *Re A* will be presented to provide a backdrop to the review carried out on the ATCSA 2001.<sup>361</sup>

The first of the cases was *Soering v. UK*.<sup>362</sup> This involved the extradition of a German national from the UK. Soering fought extradition proceedings to the United States on the grounds of Article 3 because he feared he would be sentenced to death (he was accused of murder and the death penalty was a possibility). The UK contended that Article 3 should not apply to extradition cases because it would mean the community would harbour a possible criminal leaving them 'untried, at large and unpunished'.<sup>363</sup> The ECtHR held that there

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<sup>360</sup> 19<sup>th</sup> November 2001, The Home Affairs Committee, The Anti-Terrorism Crime and Security Bill 2001. Para 68(b)

<sup>361</sup> Whilst it is acknowledged that the cases presented here are from different courts, they have been used to demonstrate influences in how controversial decisions may have been arrived at rather than their direct influence in construction of legislation and used as precedent.

<sup>362</sup> ECHR (1989) 11 EHRR 439.

<sup>363</sup> Ibid. Para 86.

would be a breach of Article 3 if the extradition of Soering took place. The considerations presented by the UK could not absolve the contracting parties from responsibility under Article 3. The ECtHR also stressed that any interpretation of the rights and freedoms guaranteed had to be consistent with the ‘... general spirit of the convention, an instrument designed to maintain and promote the ideals and values of democratic society’.<sup>364</sup> The ECtHR has further expressed that ‘inherent in the whole convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of individuals’ fundamental rights’.<sup>365</sup> This judgement created a number of barriers for the UK, particularly in how it dealt with the prevention of extradition on grounds of Article 3.<sup>366</sup> Although this case does not focus on national security, later courts relied upon it when dealing with the removal of individuals from the UK.

The second case was *Chahal v. UK*.<sup>367</sup> Chahal entered the UK illegally in 1971 but in 1974 was awarded indefinite leave. Following his arrest in 1984, 1985 and 1986, Chahal was refused British citizenship based on his links with events in the Punjab; events which had led to many Sikhs engaging in a political campaign in India. In 1990 the Home Secretary decided that Chahal ought to be deported because his continued presence in the UK was not conducive to the public good for reasons of national security and the international fight against terrorism.<sup>368</sup> Chahal made an application of judicial review and was refused on 12<sup>th</sup> February 1993, followed by a dismissal by the Court of Appeal and a refusal by the House of Lords. On arrival at the ECtHR, it was noted that where national security issues are involved the courts retain the power of review but it is a limited one because, as held in the *Council of Civil Service v. Minister for the Civil Service*:<sup>369</sup>

‘The decision on whether the requirements of national security outweigh the duty of fairness in a particular case is a matter for the Government to decide, not for the Courts.’<sup>370</sup>

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<sup>364</sup> Ibid. Para 87.

<sup>365</sup> Ibid. Para 89.

<sup>366</sup> Article 3 is one of the few articles that is absolute in that it is non-derogable. As such, states must find alternative remedies to situations should there be the possibility that Article 3 may be compromised.

<sup>367</sup> (1996) 23 EHRR 413.

<sup>368</sup> Ibid. Para 12-25.

<sup>369</sup> [1985].

<sup>370</sup> (1996) 23 EHRR 413. Para 66-67.

Whilst the government argued that the guarantees afforded by Article 3 were not absolute in cases where a contracting state proposed to remove an individual from its territory, the ECtHR was explicit in identifying that the prohibition on torture provided for in Article 3 is absolute.<sup>371</sup>

The final case to be noted here is the case of *Secretary of State for Home Department v. Rehman*.<sup>372</sup> Rehman was a Pakistani national given entry clearance to enable him to work as a minister of religion in 1993. He applied for indefinite leave to remain in the UK but was refused in 1998. Rehman appealed to the SIAC under section 2(1)(c) of the SIAC 1997. In his opening statement to the SIAC the Secretary of State said, 'the security service is concerned that the presence of returned jihad trainees in the UK may encourage the radicalisation of the British Muslim community.'<sup>373</sup> The SIAC held that the expression 'national security' should be construed narrowly, rather than in the wider sense proposed by the Secretary of State. However, they recognised that there was no statutory definition of the term or legal authority directly on the point. The court decided that, in the circumstances and for the purposes of the case, they would adopt the position that a person may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the UK, its system of government or its people. This included activities directed against the overthrow or destabilisation of a foreign government if that foreign government was likely to take reprisals against the UK that would affect the security of the UK or its nationals.<sup>374</sup>

The Court of Appeal considered that the Commission had taken too narrow a view of what could constitute a threat to national security. Rehman continued to argue that the SIAC had used too narrow an interpretation of the term 'national security'. Lord Slynn, in the House of Lords, concurred with the Court of Appeal arguing that he did not accept that this risk had to be the result of "a direct threat" to the UK.<sup>375</sup> To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the Executive in deciding how the interests, including not merely military defence but

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<sup>371</sup> (1996) 23 EHRR 413. Para 79-80.

<sup>372</sup> [2001] UKHL 47.

<sup>373</sup> Ibid. Para 1.

<sup>374</sup> Ibid. Para 2.

<sup>375</sup> [2001] UKHL 47. Para 15.

democracy, and the legal and constitutional systems of the state need to be protected.<sup>376</sup> In conclusion, Lord Slynn argued that the Secretary of State was entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place.<sup>377</sup>

Lord Hoffman also provided a judgement to the House. In his summation he reiterated three errors of law noted by the Court of Appeal on behalf of the Commission. Firstly, that the Commission had given too narrow an interpretation of the concept of national security. Secondly, that the Commission should not have treated national security, international relations and other political reasons as separate compartments. Thirdly, that it was wrong to treat the Home Secretary's reasons as counts in an indictment and to ask whether each had been established to an appropriate standard of proof. The question was not simply what the appellant had done but whether the Home Secretary was entitled to consider, on the basis of the case against him as a whole, that his presence in the UK was a danger to national security.<sup>378</sup> It may, however, be worth noting that this case never progressed to the ECtHR and, therefore, this is an internal interpretation only and might not hold up in an international rights based court.

Against this backdrop of case law and the awareness and consideration of the misconstrued notion of 'right to security', a review of these case studies can be undertaken with these overarching influences in mind. This examination is further underpinned by the earlier considerations, conceptual and practical, established in Chapters One and Two of this thesis. As noted earlier, the first case study looks at discussion on derogation as a result of clause 23 contained within the ATCS Bill 2001. As previously stated, this examination is not intended as a definitive assessment of human rights adjudication but rather an exploratory investigation into if and how, rights and security emerge with the use of balance as a conduit between these two concepts.

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<sup>376</sup> Ibid. Para 16.

<sup>377</sup> Ibid. Para 8.

<sup>378</sup> Ibid. Para 46-48.

# Chapter Four:

## ATCSA 2001 – The need for derogation

**12<sup>th</sup> November 2001** – ATCSB introduced to Commons floor

**19<sup>th</sup> November 2001** – Second reading to the house

**26<sup>th</sup> November 2001** – Conclusion of consideration in committee stages and remaining ATCSB discussion

**12<sup>th</sup> December 2001** – Consideration of the Lords' amendments to the ATCSB

**14<sup>th</sup> December 2001** – ATCSB receives Royal Assent

The following chapter will review discussion undertaken in the Houses of Parliament and the JCHR on the Anti-Terror Crime and Security Bill (ATCSB) 2001. A socio-political background will be discussed identifying the climate which fostered the Bill. Following this, origins of the ATCSB 2001 will be briefly discussed focusing on Part 4 clause 21-23.<sup>379</sup> Due to the draconian nature of clause 21-23, presentation of the backdrop against which the ATCSB 2001 emerged is considered necessary to contextualise parliamentary subscription to the measures contained within the Bill.

A further overview of key themes to emerge from the quantitative analysis will also be presented. The aim here is to demonstrate some intrinsic themes within the overall body of debate which, due to the use of a specific case study, have been omitted from discussion. These themes are integral in aiding an understanding of the debate to emerge from the chapters focusing on derogation. To omit such observations may weaken later analysis.

Following this, discussion will focus specifically on derogation. The findings of the JCHR identify a number of incompatibilities of the ATCSB 2001. This chapter will address the derogation debate found within Parliament and the JCHR so as to offer as clear an analysis as possible; this assessment follows a thematic not chronological pathway. This aims to

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<sup>379</sup> These clauses went on to become section 21 and 23 ATCSA 2001.

strengthen analysis based on the lack of structure found within the debate. This lack of structure appears to be a fundamental hindrance in the limited interrogation of executive proposals found within parliamentary debate.

Only debates and discussions within the Houses of Parliament entitled 'ATCS Bill'<sup>380</sup> will be considered in this examination unless otherwise stated. Although this mantra was placed on examination specific to the case study, debate was held on the 19<sup>th</sup> November 2001 entitled 'Human Rights'. On review, this debate centred heavily on derogation and the ATCSB 2001. The discussion located in this debate was deemed too influential to omit and, therefore, a brief analysis of the debate will be presented following the case study.<sup>381</sup>

#### **4.1 Background to the ATCSB 2001:**

Post 9/11, terrorist threat rhetoric appears to have shifted focus from a domestic to an international threat.<sup>382</sup> Following the claim by George W. Bush Jr. that the world had now entered a 'War on Terror',<sup>383</sup> response to terrorism by the UK appears to have adopted a new 'political' interpretation with discussion arising politically, academically and socially as to whether a new era of threat had emerged.<sup>384</sup> Whilst the question of 'new' threat is not examined here, parliamentary debate identified the existence of a new threat as a justification for the extension of powers found within the ATCSB 2001.<sup>385</sup> Threat, and specifically 'new' threat, therefore, plays an integral role in the evolution of security measures.<sup>386</sup>

The ATCSB 2001 was introduced into the House of Commons on 12<sup>th</sup> November 2001. In the explanatory notes, its purpose was to: 'strengthen legislation in a number of areas to ensure that the government, in the light of the new situation arising from the September 11

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<sup>380</sup> It was clear from the wider analysis of Parliament that discussion on the ATCSB 2001 emerged within debates on other issues, some of which have been captured in Chapter three. However, to maintain consistency in the methodology applied to all three case studies, only debates specific to the Act discussed will be discussed within the case study analysis.

<sup>381</sup> This debate was not included in the quantitative assessment performed on the ATCSB 2001 found within Chapter Three.

<sup>382</sup> This however did not overlook the continuing threat from domestic terrorism.

<sup>383</sup> Used by George W. Bush Jr. used during a televised address to a joint session of congress. CNN. 20 September 2001.

<sup>384</sup> As discussed in Chapter Two.

<sup>385</sup> HC Vol. 381, Col. 509, M. Hancock; HC Vol. 388, Col. 1111, A. Howarth.

<sup>386</sup> It should be noted that new threat was utilised not only in anti-terror legislation but also though not exclusively, in debate on immigration, asylum and ID cards.



terrorist attacks on New York and Washington, have the necessary powers to counter the increased threat to the UK'.<sup>387</sup> The ATCSB 2001 went from its first reading in the House of Commons to Royal Assent within 33 days. This speed raised concerns throughout the duration of debate on the ATCSB 2001.

Amendments had been tabled by the government prior to the first debate in the House of Commons. This, the Home Secretary stated, was as the result of listening and responding to the JCHR deliberation.<sup>388</sup> Such amendments may be indicative of the need for the legislation to respect the safeguarding of the individual. These amendments may further indicate that a number of issues inconsistent with rights may have been resolved before the Bill arrived at Parliament. As such, this may have proved detrimental to the raising of issues with parliamentary debate.

#### **4.2 Origins of Part 4. What it said and why it was necessary:**

The impact of Article 3 ECHR on the UK's ability to deport was the primary reason cited by the executive for the inclusion of Part 4 and, in particular, clause 21 and 23. The inability of the UK to return non-nationals to countries where they may be subject to inhumane or degrading treatment forced the executive to deliver alternative measures. Whilst it was maintained that, where possible, prosecution would take place, it was also acknowledged that this was not always practical due to the nature of terrorism.<sup>389</sup> Reviewing concerns over the use of the SIAC in dealing with the repercussion of Article 3 interpretations, the Home Secretary identified that the issue was:

‘whether it is right that we should hold people in circumstances where we cannot transfer them to a third safe country, where the country to which we originally sought to transfer them does not have extradition agreements and therefore where their lives would be at risk, or whether we should release them into the community. At issue is an enhanced risk, post-11 September, which we believe warrants our taking that difficult but balanced and proportionate step’.<sup>390</sup>

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<sup>387</sup> <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/049/en/02049x--.htm> (Accessed 9/11/2011).

<sup>388</sup> HC Vol. 376, Col. 1110, D. Blunkett.

<sup>389</sup> HC Vol. 375, Col. 383, M. Fisher.

<sup>390</sup> HC Vol. 375, Col 28, D. Blunkett.

The Home Secretary identified that a choice had to be made as a result of the absolute nature of Article 3 ECHR; circumstances had, therefore, forced this move. This choice contained within clause 23 ATCSB 2001 was balanced with the risk and threat posed; a balance for the executive to make.<sup>391</sup>

Discussion on the ATCSB 2001 was further clouded by the intention of it, namely, whether the legislation was designed to respond to the threat of terrorism or whether it was designed as an immigration tool. Commenting on the rationale behind the compilation of Part 4, the Home Secretary insisted that;

‘This is our home – It is our Country. We have a right to say if people abuse rights of asylum to be able to hide in this country and organise terrorist acts, we must take steps to deal with them. The underlying question is whether this measure is necessary’.<sup>392</sup>

This statement reiterates the consideration of a balance between the nation and the individual; the right to protect the country against individuals who, whilst acting illegally, are afforded the highest protection by the non-derogable right of Article 3. No further consideration of the use of terrorism legislation as an immigration tool will be undertaken.<sup>393</sup>

With Article 3 as the key rationale for the inclusion of Part 4, the Home Secretary noted the law as being less the problem than the interpretation of it.

‘We are relating them (powers) to the issue of someone who has voluntarily come into our country, was hosted by this country, but whom we wish to remove on the grounds that they are a risk to our national security or that their presence is not conducive to the public good. We are challenged on that, not in terms of the fact that, historically, we can do that, because under the Immigration Act 1971—in

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<sup>391</sup> The impact of Article 3 on the UK had been discussed only five weeks prior to the ATCSB 2001 in the *Secretary of State for the Home Department v Rehman* (2001) UKHL 47. Awareness of such judgments could have penetrated thinking and rationale when assessing the legitimacy of moves undertaken.

<sup>392</sup> HC Vol. 375, Col. 30, D. Blunkett.

<sup>393</sup> This is based on both the constraints of this thesis and further that significant work has been carried out by Huysmans and Buonfino addressing the specific relationship between immigration and terrorism legislation. For further examination see; Huysmans, J and Buonfino, A. (2008); ‘Politics of expectation and Unease: Immigration, Asylum and Terrorism in Parliamentary Debate in the UK’.

schedule 3... The serious point is that under those immigration powers, we had the ability to deport someone from this country. What has got in our way was the judgment that we were unable to ask a person to leave because their life was at risk. I rest my case'.<sup>394</sup>

This interpretation, according to the Home Secretary had therefore created a situation whereby action must be taken to overcome the constraints of Article 3. There is evidence that a number of MPs reviewed this balance between security and rights within Part 4 through the lens of Article 3 constraints.<sup>395</sup> Whilst some observed the absurdities of the impact which Article 3 had on the UK, others were just as unconvinced that Part 4 was the most appropriate response. Gary Streeter noted:

'It is absurd that this country cannot deal with people who are a threat to national security by sending them back to their home country or onwards for trial to countries such as India or the USA. However, in response to that genuine problem, the Home Secretary has come up with a strange and dangerous solution—to intern or confine people without trial for an indefinite period, which must undermine many precious and long-regarded freedoms. He is making a very serious mistake'.<sup>396</sup>

This position demonstrates that parliament housed the belief not only of the 'absurd' nature of Article 3 but also, the 'strange and dangerous' solution, with emphasis on the 'long regarded freedoms', summing that alternatives were available.<sup>397</sup>

The fundamental concerns between security and rights were identified by Lord Beaumont in his assessment of the situation. He identified how best to achieve a balance when considering Part 4 of the ATCSB 2001 and its subsequent derogation.

'It offends the sentiment of anybody who believes in human rights to have a concept in a Bill which involves detention without trial, but sometimes that is unavoidable. Here we have the situation where those suspected of serious

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<sup>394</sup> HC Vol. 375, Col. 383, D. Blunkett.

<sup>395</sup> HV Vol. 375, Col. 67, R. Cranston; HC Vol. 373, Col. 677, I. Duncan Smith; HC Vol. 372, Col. 926, O. Letwin; HC Vol. 375, Col. 88, P. S. Khabra.

<sup>396</sup> HC Vol. 375, Col 91, Mr G. Streeter.

<sup>397</sup> This point will be considered in depth in the examination of derogation later in this chapter.

international terrorist crimes cannot be deported back to the relevant country... To me as a citizen, not as a lawyer, it is an absurd proposition to suggest that such a terrorist can remain at large in this country because of that risk or because he can find no other country to go to. I agree with the noble and learned Lord, Lord Mayhew, that in the public mind that state of affairs would require the type of action the Government are undertaking because there is no alternative. However, I further agree with the noble and learned Lord, Lord Mayhew, that in designing a system to counter that risk such a system must involve adequate legal protection and, at the least, the provision of judicial review. If that is introduced, the balance is preserved... Even if Part 4 of the Bill passes and there is derogation, the law of the European Convention will prevail in the sense that the Government may have to answer for the provisions if they are not reasonably balanced'.<sup>398</sup>

This assessment by Lord Beaumont echoed the crux of fundamental concerns about derogation. It reiterated that derogation is less the problem than is the rationale for moves. The extremity of measures continued within the ATCSB 2001 required justification. As such derogation was seen as the result of the protection offered within Article 3 values; the incorporation of SIAC to respect Article 3 ECHR, therefore, requiring derogation.

#### **4.3 Key themes to emerge out of ATSCB debate:**

A brief overview of three themes to emerge from the quantitative assessment will now be presented. These have been provided to support analysis later in this chapter which may be engaged. Each of the themes examined here raised a greater number of discussion points than rights, security or constitutional principles. Although this was not the sole rationale for their inclusion, it was deemed sufficient to warrant their embedding as a backdrop to further examination.

**4.3.1 Speed of the process:** As noted from the quantitative findings, the speed with which the ATCSB 2001 passed through parliament was a major point of discussion.<sup>399</sup> The issue itself did not raise direct concerns over security and rights; however, it was identified that the speed of the ATCSB 2001 placed limitations on discussion. As Simon Hughes noted:

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<sup>398</sup> HL Vol. 629, Col. 214, Lord Beaumont of Whitley.

<sup>399</sup> 7.1% of the overall discussion points raised were on the speed of the Bill through parliament.

‘One of the terrible consequences of this procedure is that we have an hour in total for this debate. With the best will in the world, it is impossible in an hour for the House to do justice to the arguments about the fundamental issue of keeping judicial review, or to consider the alternative before us in the form of a Government amendment whose genesis lies in a proposal by a former Lord of Appeal and Master of the Rolls. One of our complaints is that, because of the speed of the process, this legislation has needed to come back so that this issue can be revisited—as the Government now accept—and many other interrelated issues as well’.<sup>400</sup>

This reference was made in a review of the amendments made by the House of Lords and which required substantive discussion in the opinion of Mr Hughes and the Liberal Democratic Party. Complaints about the speed of the process were evident from the outset of debate within both Houses of Parliament.<sup>401</sup> Concern with the speed of the ATCSB 2001 was also acknowledged by the JCHR in its November 2001 report.<sup>402</sup>

Whilst the speed of the Bill was particularly contentious within debate, further investigation into the rationale for speed is not directly relevant to this particular examination. As such, this will not be considered any further as a standalone issue.

**4.3.2 The influence of public opinion:** Following the events of 9/11 it was apparent that the executive felt it vital to be ‘seen’ to be taking action. As David Blunkett<sup>403</sup> noted:

‘Circumstances and public opinion demanded urgent and appropriate action after the 11 September attacks on the world trade centre and the Pentagon. Many parliamentarians understandably demanded caution, proportionality and a response that would last for the future...it was the Government’s task to appraise the measures that would be necessary to close loopholes and set aside anomalies that had developed over many years in existing legislation’.<sup>404</sup>

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<sup>400</sup> HC Vol. 376, Col 923, S. Hughes.

<sup>401</sup> This was identified within Chapter Three of this thesis.

<sup>402</sup> Para 2, JCHR 2<sup>nd</sup> Report, 2001.

<sup>403</sup> David Blunkett was the Home Secretary through the duration of the discussion on the ATCSB 2001.

<sup>404</sup> HC Vol. 375, Col 22, D. Blunkett.

Whilst a demonstration of a ‘need’ to respond was presented, the need for caution in the use of this as a legitimate justification was also identified. Mark Fisher noted:

‘I am sure that there is pressure, in that the country wants the Government to do something; but, as I have said, that is a bad basis on which to legislate and to find the correct balance between the powers we have—or should have—to deal with international terrorism, and not just the protection of human rights but the maintenance of the fundamental principles of our legal system, which I consider even more important than specific human rights’.<sup>405</sup>

This response by Mark Fisher identified that, although a response was required, fundamental constitutional principles and values still required protection.

Political justification for moves made as a result of what constituents demand was also presented. As MPs:

‘We should be asking ourselves a critical question: what do members of the public – our constituents – expect us to do? That is the critical test, but it was not advanced by a single opposition member in our debate’.<sup>406</sup>

This position argued that qualification for moves was the result of the democratic process through elected representatives. Whilst important to reflect the position of the electorate and to protect the lives of individuals, this position cannot go unchallenged. Moves have to be balanced, proof of necessity and proportionality must still be demanded to warrant measures. Extension of measures presented through demands of protection made by the electorate must be substantiated rather than relying simply on the presentation of a populist agenda.

The final point to be addressed will look briefly at the inclusion of a sunset clause. The early acceptance of the clause appears to be a factor in addressing the potential weakness in Part 4.

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<sup>405</sup> HC Vol. 375, Col 75, M. Fisher.

<sup>406</sup> HC Vol. 375, Col 115, B. Hughes.

**4.3.3 Introduction of a Sunset Clause:**<sup>407</sup> The first discussion point considered on the 21<sup>st</sup> November 2001 was the introduction of a new clause. Clause 6<sup>408</sup> addressed the request in the earlier debate for the implementation of a sunset clause.<sup>409</sup> This clause allowed for a review period of the legislation which was seen by many as the compromise to responding to the ‘national emergency’. Clause 6(5) declared that Part 4 of the ATCSB, would cease to have effect at the end of a one year period.<sup>410</sup> The provisions would provide ‘exceptional rigour’ in forcing the executive to bring back sections for fundamental renewal.<sup>411</sup> As the Shadow Home Secretary identified, the renewals would be more frequent, the more controversial the provisions. The implementation of clause 6 would create a ‘sufficient lever for parliament against the executive’.<sup>412</sup> The implementation of this clause allowed the executive the emergency powers they claimed they needed whilst allowing parliament the review powers they required to maintain a constitutional hand over the Bill.

In pressing for a sunset clause, the ATCSB 2001 became operational for both factions of the debate. It met the needs of the Home Secretary (and executive) in being seen to protect national security while allowing parliament to review the legislation as protected by the sunset clause. This measure may appear as parliamentary procedure succumbing to the claims of the protection of national security. However, it may also be seen as a victory for parliamentary procedure providing for a return to examine the legislation at a later date as noted by Oliver Letwin.<sup>413</sup> By embedding the sunset clause, the House could be seen to be working to protect security, yet having the opportunity to return to the clauses of concern and challenge when greater evidence or support was available.

These three themes to emerge were substantive discussions within quantitative assessment. Whilst not directly associated with the balance between rights and security,

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<sup>407</sup> A statutory provision providing that a law will expire on a particular date, unless it is re-authorised by the legislature.

<sup>408</sup> This became section 123 in the ATCSA 2001.

<sup>409</sup> This was also accepted by the Home Secretary at the proposal of the Select Committee on Home Affairs, that amendment No. 53 which gave the sunset maximum life of 5 years to part 4. (HC Vol. 375: Col 348).

<sup>410</sup> HC Vol. 375, Col. 343, O. Letwin.

<sup>411</sup> Further clarity of this is asked for by E. Garnier from the Shadow Home Secretary, in particular the emphasis on the review by order rather than by some fully debated system.

<sup>412</sup> HC Vol. 375, Col. 344, O. Letwin.

<sup>413</sup> HC Vol. 375, Col. 344, O. Letwin.

each influenced the direction of debate at various junctures of the Bill. The speed of the Bill through parliament may have prevented proper scrutiny, including the opportunity to discuss the findings contained within JCHR reports. Speed and the consequential reduction in opportunity to scrutinise could also have resulted in the limited exposure rights and security debate received in the review process. The influence of public opinion is well documented within political decision-making, and as noted in Chapter Two, has been held to compromise decision-making with the consideration of re-election prospects.<sup>414</sup> As such, this influence of public opinion may prevent challenges from arising but, arguably compounded with the lack of legal expertise, facilitate the misconstrued belief in the 'right to security'.<sup>415</sup> The final influence discussed was the introduction of a sunset clause. As noted, the implementation of clause 6 created a lever for parliament against the executive providing imminent emergency powers whilst allowing parliament the power to review. The introduction of this clause early in the proceedings may have signalled the end of rights and security debate based on the secured notion of a review of powers after the Act was operational. Although none of these influences are quantifiable in the direct impact they had on influencing the rights and security debate either negatively or positively, the debate to emerge from each theme cannot be isolated from the case studies contained within this exploratory investigation.

#### **4.4 JCHR**

The JCHR received the ATCSB 2001 prior to its presentation before the House of Parliament. The Committee was explicit in noting that;

'When assessing the necessity for any new measure which may interfere with human rights, it will be important to establish what, if anything, it usefully adds to the powers already available to the state, and duties already applying to individuals and organisations, to protect and enhance the security of the state and its citizens'.<sup>416</sup>

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<sup>414</sup> De Londras, F and Davis, F. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism.

<sup>415</sup> This as we saw in the introduction to Section Two remains an underlying concern throughout all three case studies reviewed.

<sup>416</sup> Para 9, JCHR 2<sup>nd</sup> Report, 2001.



This guidance laid the foundations of examination and allowed the reviewer to understand the pretext for recommendations made by the Committee. Legislation is not to be taken as a standalone piece, but viewed in line with other available legislative tools. Such a combination of tools, however, was not clear from examination of the debate found within the Houses of Parliament. The Committee also indicated that the legislation would not be supported if it aimed to introduce wider-ranging powers than those necessary to deal with the 'novel' threat. The Committee's indicator for this was identified by its refusal to accept parts of the Bill which 'would not have received parliamentary support but for current concerns about terrorism and fear of attack'.<sup>417</sup> A main concern of the Committee was the rapid creation of the legislation:

'We are conscious that it is precisely in such circumstances as the aftermath of the attacks of 11 September that the protection of human rights will come under the greatest pressure from the demands of the state (and of public opinion) for greater security, and the demands placed upon Government agencies to be seen to be 'doing something'.<sup>418</sup>

This is interesting because it reaffirms the influence of 'public opinion' on the government - a point demonstrated earlier. The Committee's job, however, was to identify when 'doing something' oversteps the boundaries identified by current legislation and policy.<sup>419</sup>

The Committee identified a number of clauses which it considered to raise rights issues. These included;

- The decision to give notice of a derogation from the right to liberty under Article 5 of the ECHR;
- The proposals in Part 4 to detain certain suspected terrorists without trial and to restrict their rights to legal due process;
- The re-introduction in Part 3 of the Bill of provisions on information gateways which was criticised by this Committee in the last session of Parliament;
- The implications of the creation of Part 5 of an offence to incite religious hatred; and

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<sup>417</sup> Para 5, JCHR 2<sup>nd</sup> Report, 2001.

<sup>418</sup> Para 2, JCHR 2<sup>nd</sup> Report, 2001.

<sup>419</sup> Para 2, JCHR 2<sup>nd</sup> Report, 2001.

- The introduction in clause 76 and Parts 10, 11 and 13 of powers (particularly for the police) which are not directed wholly or mainly towards any threat to security from terrorism.<sup>420</sup>

The Committee raised these concerns in particular and addressed them accordingly with the government. Part 3 was discussed briefly by the Committee but oral evidence provided by the Home Secretary had already been examined. Redrafting of clauses had taken place and the Committee welcomed the evidence of willingness to take into account the views presented by the Committee in the re-drafting of the clause.<sup>421</sup>

Turning to the remit of Part 5, the Committee outlined that:

‘Part 5 of the Bill deals with incitement to religious and racial hatred. It would extend the existing offence of incitement to racial hatred to cover the incitement of racial hatred against people outside the United Kingdom. It seems likely that this extension of an existing interference with the right to freedom of expression under Article 10 of the ECHR would be held to be capable of being justifiable...The Bill would also create a new offence of incitement to religious hatred against people or groups within or outside the United Kingdom, and extend the aggravated penalties for certain racially-motivated offences to those who commit those offences with religious motivation’.<sup>422</sup>

Addressing this issue, the Committee highlighted that:

‘as long as the legislation is applied in a way that focuses closely on the prohibited purpose and outcome of speech, that it is the incitement of hatred on religious grounds, it is therefore likely to be possible to justify it as a necessary and proportionate measure to protect the rights of others under ECHR Article 10(2)’.<sup>423</sup>

With this concern, it was confirmed that the Bill would not restrict freedom to express opinions and beliefs, including those which are critical of some or all religion, whether

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<sup>420</sup> Para 17, JCHR 2<sup>nd</sup> Report, 2001.

<sup>421</sup> Para 55, JCHR 2<sup>nd</sup> Report, 2001.

<sup>422</sup> Para 56, JCHR 2<sup>nd</sup> Report, 2001.

<sup>423</sup> Para 58, JCHR 2<sup>nd</sup> Report, 2001.

expressed seriously or satirically. The Committee felt that this confirmation helped resolve the potential issues which arose from the initial wording in Part 5.

Part 10, 11 and 13 of the ATCSB 2001 raised concerns specifically over police powers. In particular, the extension of powers in clauses 93-97: requiring anyone to remove any item which the constable reasonably believed as being worn wholly or mainly to conceal identity. The Committee highlighted that the removal of face coverings 'maybe a matter of sensitivity to certain people'.<sup>424</sup> Maintaining their concern with this measure and identifying that the provision risked being 'seen as authorizing an unreasonable and disproportionate interference with their dignity', the Committee indicated that removal of face coverings 'should be subjected to the most careful scrutiny on human rights grounds'.<sup>425</sup> Key to this was the potential breach of Article 8 ECHR with respect for private life and a potential breach of Article 9 which awards individuals the right to manifest their religion. Part 11 of the Bill dealt with the retention of communications data which was identified as falling outside of the protections offered by Chapter 2, Part 1 of the RIPA 2000. The Committee considered that measures should be put in place to ensure that the Code of Practice and any directions compatible with the right to respect for private and family life, home and correspondence under Article 8 ECHR, and that those measures should be specified, so far as practicable, on the face of legislation.<sup>426</sup> Part 13 was also covered by this recommendation by the Committee.

The most contentious issue identified by the committee was the derogation from Article 5 ECHR, the result of Part 4 ATCSB 2001. The basis for derogation related to the treatment of certain foreign nationals whose presence in the UK was deemed, by the Home Secretary, as being a threat to security. To derogate from Article 5 ECHR, the UK had to action Article 15 ECHR. Article 15 provides that;

'In time of war or other public emergency threatening the life of the nation any high contracting party may take measure derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation,

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<sup>424</sup> Para 64, JCHR 2<sup>nd</sup> Report, 2001.

<sup>425</sup> Para 64, JCHR 2<sup>nd</sup> Report, 2001.

<sup>426</sup> Para 72, JCHR 2<sup>nd</sup> Report, 2001.

provided that such measures are not inconsistent with its other obligations under international law...<sup>427</sup>

The Committee further acknowledged the problems the government faced by being unable to derogate from Article 3 without 'denouncing' the Convention as a whole.<sup>428</sup> Whilst this option required derogation from Article 5, this move was permissible under Article 15 allowing the UK to remain within the constraints of the ECHR. Derogation had been necessitated because Part 4 provided for the indefinite detention of suspected international terrorists who were not brought to trial in the UK, and who the UK would wish to deport or remove. These individuals, however, could not be removed because of Article 3 ECHR. The committee also acknowledged that Part 4 limited the availability of judicial review and habeas corpus. A restricted appeal process was, however, provided through the SIAC.<sup>429</sup> Although the Committee held no definitive view on the government's need to adopt the precautionary derogation it believed that clause 23 of Part 4, 'does not in itself make it clear that the purpose of detaining the suspect is solely to find a safe country to which to remove him or her'.<sup>430</sup> This concern arose from the government's willingness to allow an individual to be removed to a country where the individual in question would be able to resume terrorist activity. Having addressed this issue, however, if the government were not willing to allow the move then the restriction found in Part 4 allowed for the detention to appear as indefinite internment rather than detention pending removal. This would be more likely to violate Article 5(1)(f) ECHR.

The request for derogation argued that public emergency existed within the meaning of Article 15(1) of the Convention. The UK also relied on the recourse that the UN Security Council had recognised the attacks of 11 September 2001 as a threat to international peace and security. UN resolution 1373 required all states to take measures to prevent the commission of terrorist attacks including denying safe haven to those who finance, plan, support or commit them. The schedule identifies that the UK believed that threat existed in the UK, particularly from foreign nationals residing in the UK. These suspected terrorists threatened security and Part 4, therefore, was strictly required by the exigencies of the

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<sup>427</sup> Article 15 ECHR.

<sup>428</sup> Para 19, JCHR 2<sup>nd</sup> Report, 2001.

<sup>429</sup> Para 20, JCHR 2<sup>nd</sup> Report, 2001.

<sup>430</sup> Para 23, JCHR 2<sup>nd</sup> Report, 2001.

situation.<sup>431</sup> The Committee also indicated that by derogating from Article 5 ECHR, the UK would also need to derogate from Article 9 of the ICCPR which is the right to liberty. In this situation the Committee believed that the state bore the burden of proving, to the Committee's satisfaction, that there was a public emergency threatening the life of the nation, and that any interference with rights was only as extensive as was strictly required by the exigencies of the situation.<sup>432</sup> The Committee identified that the request for derogation caused concern because of the 'lack of specificity in the reasons given...for the asserting that there is a public emergency threatening the life of the nation'.<sup>433</sup> In assessing the Home Secretary's evidence it was identified that his justification was grounded in that the threat, though variable, was generally greater now than presented by the IRA in the 1970s with access to WMD<sup>434</sup> as just one example. In summing the Home Secretary's evidence the Committee felt that, whilst some of the judgments may depend heavily on assessing information derived from sources which must properly be kept secret, there was also a lack of evidence shown to support the position attained. The Committee summated its position on the derogation suggesting that:

'No court in this country will be able to decide whether the derogation is justified against the criteria of Article 15 of the ECHR, it is especially important for each House to decide whether they are satisfied of the existence of a public emergency, the lack of safeguards built into the Bill, particularly in relation to detention powers, causes us to doubt whether the measure in the Bill can be said to be strictly required by the exigencies of the situation'.<sup>435</sup>

The final assessment made by the Committee reviewed the integration of Part 4 and the legality of the clauses found within it. Some issues were raised by the Committee in alternative sections such as the discussion on derogation; nonetheless, Part 4 received considerable assessment. It was raised by the committee that the wide definition afforded to international terrorists, as defined in clause 21(2), could prove problematic. The Committee indicated that the key issue in this particular assessment was whether the

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<sup>431</sup> Para 25, JCHR 2<sup>nd</sup> Report, 2001.

<sup>432</sup> Para 27, JCHR 2<sup>nd</sup> Report, 2001.

<sup>433</sup> Para 29, JCHR 2<sup>nd</sup> Report, 2001.

<sup>434</sup> A claim later found to be spurious and one which changed the dynamic of parliamentary review in the TA 2006.

<sup>435</sup> Para 30, JCHR 2<sup>nd</sup> Report, 2001.

definition of ‘international terrorist’ in the act was sufficiently clear and non-discriminatory to avoid arbitrariness. The Committee held that such a wide definition was not acceptable and considered it important that the:

‘class of people liable to be regarded as international terrorists should be sufficiently and clearly defined, because a certificate under clause 21 would have significant effects on the person’s rights to liberty under Article 5 of the ECHR’.<sup>436</sup>

In examining Part 4, it was found that some of the phraseology used in the Bill was open to abuse and potentially over-inclusive.<sup>437</sup>

The next point on this issue raised by the Committee was the risk in discriminating between those who could not be removed subject to immigration control and those with the unconditional right to remain in the UK. The Committee was concerned that the measure ‘might lead to discrimination in the enjoyment of the right to liberty on the grounds of nationality’,<sup>438</sup> noting further that ‘we are not persuaded that the risk of discrimination on the grounds of nationality in the provisions of Part 4 of the Bill has been sufficiently taken on board’.<sup>439</sup> This assessment was an explicit indicator to both Houses of Parliament to reassess the severity and repercussions of the inclusion of Part 4. It is, therefore, surprising that there was not greater debate of this issue in parliament. Even though the executive and the legislature were aware of these potential discrepancies the incompatible features remained.

In an examination of the rights of due process, the Committee believed that there was reasonable protection for appellants’ rights on three grounds. Firstly, because the SIAC offered a full hearing on the merits of the case; secondly, the use of nominated representatives to represent the interests of applicants when national security evidence needed to be examined adequately balanced the needs of the state and the interests of the applicant; and finally, there was the opportunity to appeal on points of law.<sup>440</sup> Whilst the Committee accepted the use of the nominated representative for the SIAC process, they

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<sup>436</sup> Para 34, JCHR 2<sup>nd</sup> Report, 2001.

<sup>437</sup> The definition of terrorism has remained a problem throughout the legislative debate and continues to be problematic in its width however this is not for review here.

<sup>438</sup> Para 38, JCHR 2<sup>nd</sup> Report, 2001.

<sup>439</sup> Para 39, JCHR 2<sup>nd</sup> Report, 2001.

<sup>440</sup> Para 47, JCHR 2<sup>nd</sup> Report, 2001.

were concerned that this might not be adequately protected in higher courts. The Committee, therefore, recommended that the role of the nominated representative should be extended to include participating in appeals from the SIAC in appropriate cases, including cases arising under the ATSCB 2001.<sup>441</sup>

The report presented by the Committee was particularly thorough and identified many of the problems which would be seen later in declarations of incompatibility. What is not clear is how this report was used by the government to reconfigure parts of the Bill open to challenge. Ultimately, government and parliament had a duty to use the findings of this report to fool-proof the legislation prior to Royal Assent. Lack of reliance on these findings suggests that the influence that committees such as this have is purely hypothetical rather than deeply entrenched in the process of decision-making. Experts with the ability to examine material closely, and outside of a political firing line, may be expected to be a source utilised in the legitimacy of legislation before parliament. Further government use of such recommendations and findings could help warrant decisions made if brought in line with the Committee's provisions.

The JCHR followed up their initial report on the ATCSB 2001 with a further report in December 2001. It was instantly flagged up as with the previous report, that the time frames within which parliament were expected to examine such an important piece of legislation were insufficient. As the Committee pointed out, the House of Commons received only 16 hours to deal with 126 clauses and eight schedules. Agreeing with the views projected by the House of Lords Select Committee on the Constitution, the Committee upheld that:

'The inclusion of many non-emergency measures was inappropriate in emergency legislation which was required to be considered at such speed'.<sup>442</sup>

During this 5<sup>th</sup> report by the Committee it was reiterated that, even though the HRA 1998 (Designated Derogation) Order was now in force, the case for the conditions of derogation had still not been met. The reason this issue was as contentious as highlighted by the Committee was because:

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<sup>441</sup> Para 49, JCHR 2<sup>nd</sup> Report, 2001.

<sup>442</sup> Para 2, JCHR 5<sup>th</sup> Report, 2001.

‘assuming that the order is valid, it will not be a violation of the right to liberty to detain a suspected terrorist suspect, covered by a certificate issued under clause 21, against whom a deportation order has been made, but who cannot be deported because it has not so far been possible to find a country which is prepared to take the person and in which he or she would not be at risk of death, torture or inhuman or degrading treatment or punishment’.<sup>443</sup>

The Committee found a key failing in the lack of explicit explanation of what was covered by the wording found within the legislation. The Committee summated its position on derogation expressing that:

‘it is essential for the Bill to be clarified to ensure that the object and purpose of the exceptional power to detain is confined only to cases where the government has concluded that it would be impossible or inappropriate to prosecute the person, and is seeking diligently for a safe country’.<sup>444</sup>

Ultimately, the Committee strongly advised both houses to seek to ensure that the terms proposed were narrowly drawn. The ability to provide definitive narrow definitions became redundant following the limited time allotted for review. This report identified that derogation may be sustainable providing it could prove and validate its reasoning for derogating.

The Committee moved on to re-examine Part 4 of the Bill. It was welcomed that clause 21(1) had been amended which introduced a legal requirement for reasonableness relating to the certification of suspected international terrorists. The Committee, however, was still concerned about the implications of clauses 25(2)(a) and 26(4)(a) relating to the SIAC. After discussing the rationale behind the introduction of the SIAC based on Article 5(4) it was stipulated that:

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<sup>443</sup> Para 4, JCHR 5<sup>th</sup> Report, 2001.

<sup>444</sup> Para 6, JCHR 5<sup>th</sup> Report, 2001.



‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’.<sup>445</sup>

It was established that the SIAC was created after the ECtHR held in the case of *Chahal*<sup>446</sup> that judicial review did not provide sufficient safeguards for liberty to satisfy the requirements of Article 5(4) in cases of deportation involving national security. This decision was reached on two accounts. Firstly, the courts in judicial review did not undertake a full review of the merits of the Home Secretary’s decision in such cases, but only quashed a decision if they considered that it was so unreasonable that no reasonable Home Secretary could have made it. Secondly; most of the information on the basis of which the Home Secretary made such decisions would be likely to be withheld from the court and from the applicant on public-interest grounds, making review by the courts too exiguous to offer real protection for the right to liberty.<sup>447</sup>

Clause 25 dealt with the appeal of a suspected international terrorist against his certification whilst clause 26 dealt with the automatic, periodic reviews by the SIAC of the continuing detention of people certified under clause 21. The concern for the Committee here was that this clause prevented the SIAC from being able to act on evidence which showed at a later date that the suspicion or belief, while reasonable, was mistaken. Therefore, clause 26(4), in the opinion of the Committee, did not satisfy the requirements of Article 5(4). The reviews must be frequent enough and rigorous enough to ensure that people did not remain in detention for longer than necessary. The Committee identified that a resolution to this problem would be for clause 26(4) to be amended so as to identify clear grounds which the SIAC would be able to consider on a review equivalent to those identified by clause 25(2). This amendment would avoid the risk of incompatibility under Article 5(4) ECHR.<sup>448</sup>

These two areas were the main discussion of the fifth paper released by the JCHR in 2001/02. The Committee concluded that:

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<sup>445</sup> Para 10, JCHR 5<sup>th</sup> Report, 2001.

<sup>446</sup> (1996) 23 EHRR 413

<sup>447</sup> Para 10, JCHR 5<sup>th</sup> Report, 2001.

<sup>448</sup> Para 16, JCHR 5<sup>th</sup> Report, 2001.

‘the Bill contains a disparate collection of measures which are likely to have a major impact on a wide range of rights...We acknowledge the seriousness with which the Government has engaged in a dialogue with those who seek to uphold the core values of democratic society in difficult times...There are a number of aspects of the Bill which we are concerned may continue to compromise the protection of human rights in ways which have not so far been fully justified’.<sup>449</sup>

What these reports by the Committee have identified is that moves were not vetoed on the grounds that they were wrong, but that the Government had failed to effectively justify the necessity of clauses. The JCHR provided extensive review and drew out a significant number of concerns of various degrees regarding the potential incompatibility and legality of the ATCSB 2001. The Committee was methodical and structured in its approach, allowing for focused and rigorous review time constraints, a weakness identified within the review process of the Houses of Parliament, aside. Focusing on Part 4 in particular, the JCHR were explicit in recognising that Part 4 had potential to breach Article 14 ECHR; a key issue which received limited attention in the Houses of Parliament. As noted earlier, parliament has a duty to utilise these findings to fool-proof the legislation prior to Royal Assent. A lack of reliance on these findings confirms that the influence of committees such as JCHR remains hypothetical in influential capability rather than deeply entrenched in the process of decision-making.

Having now reviewed a number of external influences and other discussions aligned with the ATCSB 2001, analysis will focus on the influence of derogation.

#### **4.5: The trigger for derogation:**

A fundamental issue of concern with the ATCSB 2001, as confirmed by the JCHR, was the necessity of ‘derogation’. Raising a number of other discussions with associated concerns over security, rights and constitutional boundaries, this review will aim to articulate them within this assessment.

Whilst reduction of the ATCSB 2001 to one case study may appear to undermine the depth of provisions, the purpose of this focus is to provide a contextual analysis to extract, develop

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<sup>449</sup> Para 32, JCHR 5<sup>th</sup> Report, 2001.

and support information previously established. The emphasis on this case study is to provide as focused an assessment as possible to help the understanding of the type of 'debate' engaged in by parliament. This case study was selected by satisfying JCHR concerns of rights compatibility, alongside government claims that the threat faced by the UK and the constraints of Article 3 ECHR, required such extension of power in the name of security.

Whilst members of the House of Lords identified from the outset that the ATCSB 2001 contained 'specific and targeted measures', which struck a balance between 'respecting fundamental liberties and ensuring that they are not exploited',<sup>450</sup> others disagreed.<sup>451</sup>

To derogate from Article 5 ECHR, the UK had to action Article 15 ECHR which provides that:

'In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law(...)'.<sup>452</sup>

Derogation had been necessitated because as established, Part 4 provided for the indefinite detention of suspected international terrorists who were not brought to trial in the UK and who the UK would wish to deport or remove.<sup>453</sup> These individuals, however, could not be removed because of Article 3 constraints. Those detained under Part 4 could make appeals to the SIAC to overrule the decision of detention. The role, function and legitimacy of the SIAC are not being reviewed here based on two assertions. Firstly, that however viewed, the SIAC was a well-established principle within the legislative framework provided for by the SIAC Act 1997. Secondly, the SIAC was considered by the JCHR to offer reasonable protection for appellants' rights on three grounds.<sup>454</sup> As such, only discussion on derogation will be reviewed for the ATCSB 2001.<sup>455</sup>

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<sup>450</sup> HL Vol. 629, Col. 144, Lord Rooker

<sup>451</sup> HL Vol. 629, Col. 1443, Lord Mayhew of Twysden.

<sup>452</sup> ECHR Article 15(1).

<sup>453</sup> Clause 23 ATCSB 2001

<sup>454</sup> Para 47, JCHR 2<sup>nd</sup> Report, 2001.

<sup>455</sup> This does not mean, however, that discussion on Part 4 will not penetrate this review.

The detention of foreign nationals under clause 23 ATCSB 2001 was seen to be incompatible with Article 5 ECHR which guarantees the right to liberty and security. However, the ECHR allows deprivation of liberty if the measures are ‘in accordance with a procedure prescribed by law’.<sup>456</sup> Emphasis falls on Article 5(1)(f), which allows for ‘lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition’.<sup>457</sup> The purpose of clause 23 ATCSB 2001 was to detain suspected international terrorists who could not be removed from the UK due to the constraints of Article 3 ECHR. This was evidenced earlier in *Chahal*.<sup>458</sup> A fundamental problem, however, emerges because, those detained under clause 23 ATCSB 2001 would not be undergoing deportation proceedings because Article 3 prevents it. As such, clause 23 of the ATCSB 2001 was in breach of Article 5(1) ECHR and did not fall under the exception of Article 5(1)(f). This led to the UK formally derogating from Article 5(1) ECHR issuing an order in accordance with Article 15(3) ECHR.<sup>459</sup> Before opening up the debate on derogation it is necessary to discuss the grounds for the validity of derogation which is a concern that, itself, was a matter of debate in parliament.

The validity of derogation depends on the fulfilment of several legal requirements. Firstly, the derogating government must establish the existence of a ‘public emergency threatening the life of the nation’. Secondly, the ‘public emergency’ must be officially proclaimed. Thirdly, the measures must only be to the extent strictly required by the exigencies of the situation. Finally, these measures must neither be inconsistent with other obligations under international law nor discriminatory.<sup>460</sup> Each requirement provides a legitimate opportunity for challenge in parliamentary debate to the executives proposed measures. However, as will be seen, these challenges appear limited in depth and sporadic in nature.

Whilst the requirement of ‘The existence of a public emergency’ lacks a specific definition of what is meant by ‘time of public emergency threatening the life of the nation’, case law has

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<sup>456</sup> ECHR Article 5.

<sup>457</sup> ECHR Article 5(1)(f).

<sup>458</sup> *Chahal v. United Kingdom*, (1996) 23 EHCR 413.

<sup>459</sup> This stated that ‘Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed’.

<sup>460</sup> For further examination See Michaelsen, C. (2007); *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? – A British-Australian Perspective*. Pp. 138.

provided some guidelines. The first substantive interpretation of Article 15 ECHR was made in *Lawless v. Ireland*<sup>461</sup> and was further developed and clarified in the Greek case.<sup>462</sup> In order to constitute an Article 15 emergency the Commission held that a 'public emergency' must have the following four characteristics:<sup>463</sup>

1. It must be actual or imminent.
2. Its effects must involve the whole nation.
3. The continuance of the organized life of the community must be threatened
4. The crisis or danger must be exceptional, in that the normal measures or restrictions permitted by convention for the maintenance of public safety, health and order, are plainly inadequate.

Ultimately it is the state which bears the burden of proof to establish the existence of a 'public emergency'. However, as identified in *Ireland v UK*,<sup>464</sup> the concept of 'margin of appreciation does exist'.<sup>465</sup> Michaelsen argues that the existence of such doctrine identified from this case, 'illustrates the general approach of the international organs to the difficult task of balancing the sovereignty of contracting parties with their obligations under the convention'.<sup>466</sup> In the context of derogation in times of 'public emergency threatening the life of the nation', the margin of appreciation represents the discretion left to a state in ascertaining the necessity and scope of measures of derogation from protected rights in the circumstances prevailing within its jurisdiction. In *Ireland v. UK*, the ECtHR held that:

'it falls in the first place to each contracting state, with its responsibility for "the life of [its] nation"', to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position

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<sup>461</sup> *Lawless v. Ireland*, (No.3) (1961).

<sup>462</sup> *Greek Case* (1969).

<sup>463</sup> *Ibid.* Para.153.

<sup>464</sup> (1978) 2 *EHRR* 25

<sup>465</sup> *Ireland v. United Kingdom*. (1978) 2 *EHRR* 25 Para. 207

<sup>466</sup> Michaelsen, C. (2007); *Derogating from International Human Rights Obligations in the 'War Against Terrorism'? – A British-Australian Perspective*. Pp.138/139

than the international judge to decide both on the presence of such an emergency and on the scope of derogations necessary to avert it. States however, do not enjoy an unlimited margin of appreciation'.<sup>467</sup>

The proportionality of measures must only be to the extent strictly required.<sup>468</sup> Derogation measures therefore must be strictly proportionate. Pulling on the experiences of court judgments and the interpretation of Article 15(1)ECHR, Michaelsen identifies that derogation measures must therefore fulfil five basic requirements:

1. The measures must be necessary, i.e., actions taken under ordinary laws and in conformity with international human rights obligations are not sufficient to meet the threat.
2. The measures must be connected to the emergency, i.e., they must *prima facie* be suitable to reduce the threat or crisis.
3. The measures must be used only as long as they are necessary, i.e., there must be a temporal limit.
4. The degree to which the measures deviate from international human rights standards must be in proportion to the severity of the threat, i.e., the more important and fundamental the right which is being compromised, the closer and stricter the scrutiny.
5. Effective safeguards must be implemented to avoid the abuse of emergency powers. Where measures involve administrative detention, safeguards may include regular review by independent national organs, in particular by the legislative and judicial branches.<sup>469</sup>

The doctrine of margin of appreciation is applicable not only in the process of assessing the existence of a 'public emergency' but also in the context of proportionality. The ECtHR held in *Ireland v. UK* that it falls to the contracting party to determine 'how far it is necessary to

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<sup>467</sup> *Ireland v. United Kingdom*. (1978). 2 EHRR 25. Para. 207

<sup>468</sup> See Article 15(1) ECHR and Article 4(1) ICCPR

<sup>469</sup> Michaelsen, C. (2007); *Derogating from International Human Rights Obligations in the 'War Against Terrorism'?* – A British-Australian Perspective. Pp. 140/141.

go in attempting to overcome the emergency'.<sup>470</sup> As such, if it could be proven that both public emergency and measures of proportionality were met, and that the margin of error for potential incompatibilities could be justified. There are two clear themes available to parliament for challenge of the legislation<sup>471</sup> and two which remain absent from parliamentary debate.

#### **4.6 Derogation:**

The necessity of derogation as the result of detention without trial of non-national terror suspects was examined as a key discussion in line with a review of Part 4.<sup>472</sup> As demonstrated earlier,<sup>473</sup> the measures contained within the ATCSB 2001 may have been better received if evidence could substantiate the claims of necessity. However, aside from a lack of unambiguous evidence to support executive measures, it was widely accepted that international terrorism against western civilisation was active.

As already established,<sup>474</sup> the structure of Article 15 ECHR requires a derogating state to satisfy two discrete tests: firstly, that an exceptional circumstance such as a war or other public emergency threatening the life of the nation exists, and secondly, that measures restricting fundamental rights are 'strictly required by the exigencies of the situation'.<sup>475</sup>

Chapter one identified the malleable definition which the term security carries with it. It is so subjective that to attribute actual meaning to it is almost impossible. It appears a concept moderated by a Home Secretary and, therefore, can be easily manipulated through risk communication and rhetoric and in the calculated siphoning of intelligence and evidence. Claims of 'security' and 'national emergency' were used to underpin the need for Part 4 and consequently, derogation.<sup>476</sup> It is important to note that whilst these references of 'security' and 'national emergency' were relied upon throughout the debate there appears little, if any, reference to or explanation of what these concepts meant in order to 'justify' the

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<sup>470</sup> Ireland v. United Kingdom. (1978). 2 EHRR 25. Para.207.

<sup>471</sup> It is important to note that this case study is not an examination of the legality of derogation but if and how rights and security debate was utilised in favour of justifying a position on the derogation debate.

<sup>472</sup> As identified by the Home Secretary, derogation from the ECHR would only be required if Parliament accepted the clauses found within ss 21-23 ATCSB 2001.

<sup>473</sup> Pp. 120

<sup>474</sup> Pp. 127

<sup>475</sup> ECHR Article 15.

<sup>476</sup> HC Vol. 372, Col. 293, D. Blunkett; HL Vol. 628, Col. 566, Lord Davies of Coity.

measures contained within the ATCSB 2001. Loose reference was made to legislation which confirmed that extensions of powers were possible when a state was faced with a 'national emergency', however, the evidence to substantiate the claim that the UK was facing a 'national emergency' appears to never have been fully dissected within parliamentary debate.

Discussion on derogation lacked clarity, consistency and direction however, by accepting the necessity of Part 4, discussion arose assessing the necessity of derogation. It did not go unrecognised that to permit derogation could lead to future consequences:

'The effect of the derogation takes away from the accused the right to a fair trial and to defend himself in person or through legal assistance, and the right to examine or have examined witnesses against him, and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as the witnesses against him'.<sup>477</sup>

Therefore the parameters identified here drew on the constitutional boundaries which in turn, according to Mr McNamara, impacted on legally protected rights such as right to a fair trial.

In balancing security and rights, the ECHR, as interpreted by Judge Wildhaber, was 'protecting democracy by recognising the state's right to counter terrorism.'<sup>478</sup> It is from this that Baroness Whitaker identified the ability to derogate from Article 5 ECHR but not from Article 3 which absolutely prohibits despatching anyone to torture or to other inhuman or degrading treatment. The purpose of the article enabling derogation, according to Judge Wildhaber, was to:

'Balance the vital needs of the state with the strongest protection of human rights'.<sup>479</sup>

Baroness Whitaker stressed that to counter terrorism under the Convention, rights may be curtailed to the extent necessary; a position that is well established in theory and practice. The issue, therefore, assuming that there was an emergency, was not that rights of suspects

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<sup>477</sup> HC Vol. 375, Col. 81, K. McNamara.

<sup>478</sup> Paul Sieghart lecture to the British Institute of Human Rights (Vol. 629, Col. 203, Baroness Whitaker).

<sup>479</sup> Ibid.



were curtailed but whether the extent of the curtailment was necessary.<sup>480</sup> This, however, does not establish how to obtain this balance. Further to this, the requirement of proof that such curtailments are necessary was not a new concept to expose the executive to as established earlier by Dyzenhaus.<sup>481</sup> The question of balance, however, continues to emerge; not just what requires balance but also how to balance.

Derogation from Article 5 and Part 4 ATCSB 2001 were reliant on one another. Throughout discussion on derogation within the House of Commons, security and emergency appear to be used interchangeably, particularly when looking at derogation issues. As a result of this, the two concepts, whilst coded independently of one another, have been used interchangeably within this brief analysis. From the outset of discussion the Home Secretary emphasised that derogation from Article 5 under Article 15 would only be necessary if clauses 21, 23 and their associated provisions were accepted by parliament. This placed the responsibility of derogation on parliament with the provision for derogation automatically falling if parliament rejected the clauses mentioned.<sup>482</sup>

This emphasis on parliament's responsibility was further compounded when the Home Secretary expressed that the executive were 'seeking the consent of the house on derogation',<sup>483</sup> offering the house the opportunity to challenge provisions. By requesting 'consent' rather than 'support' authorisation again sat with parliament. Parliament, rather than the executive, would as a result be responsible for derogating.<sup>484</sup>

When presenting the ATCSB 2001, the Home Secretary was asked to provide a definition of what the executive deemed a 'national emergency'<sup>485</sup> to warrant derogation. No definition of what the executive deemed to be a national emergency was presented by the Home Secretary. Derogation, according to the Home Secretary, was available through domestic legislation (TA 2000), Article 15 ECHR 1953, and the European Convention on Refugees

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<sup>480</sup> HL Vol. 629, Col. 203, Baroness Whitaker.

<sup>481</sup> See Chapter Two, 'proof and accountability'.

<sup>482</sup> HC Vol, 375, Col. 22, D. Blunkett.

<sup>483</sup> Ibid.

<sup>484</sup> The question of the validity of derogation is raised by A. Hunter HC Vol. 375, Col. 74 who questions whether 'we face an emergency that threatens the life of the nation may be open to considerable doubt. The greatest threat to the Security of the UK from terrorism is still the threat of Irish terrorism, and the non-applicability of the Bill to such terrorism is a matter of concern'. This concern over double standards and the extension of the Bill in failing to facilitate the threat from Irish Terrorism is also raised by O. Letwin (HC Vol. 375, Col 41), T. Taylor (HC Vol. 375, Col. 32), J. Donaldson (HC Vol. 375, Col. 85).

<sup>485</sup> HC Vol. 375, Col. 25, E. Llwyd.

1951.<sup>486</sup> This response failed in answering the question asked but rather identified legislation which acknowledges the ability to derogate. Relying on this legislative framework to support the ability to derogate was, according to the Home Secretary, the result of their creators who ‘foresaw circumstances in which it would be necessary to take action to derogate—to suspend temporarily—a particular article or clause, in order to be able to act in a particular way to respond to what was happening’.<sup>487</sup> This response failed to explain how the executive justified, and more importantly, satisfied, the criteria for the extension of powers found within the ATCSB 2001.

Substantive proof that ‘national emergency’ existed was later requested by Edward Garnier. By challenging the executive to prove necessity to derogate, Mr Garnier discharged responsibility from those asked to support moves back onto the executive.<sup>488</sup> As Mr Garnier noted, while the burden of proof is heavy, the standard of proof to be expected ‘must be sufficient at least to stir in our minds a feeling that this is policy that has been thought through and is evidence based’.<sup>489</sup> Request of ‘proof’ for measures is a central theme in limited challenge of the proposed legislation. The government were not forthcoming in their display of substantive evidence to support claims that derogation, as a result of Part 4, was necessary. Without having evidence to scrutinise, the opportunity for MPs to uncover deeper issues with the Bill was also limited. Until parliament was satisfied that the measures contained were necessary, questions of proportionality were arguably redundant.

When reviewing the necessity to derogate, although challenges existed requesting proof, the challenge to the lack of proof appeared limited. As such the Shadow Home Secretary was:

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<sup>486</sup> HC Vol. 375, Col. 25, D. Blunkett.

<sup>487</sup> Ibid.

<sup>488</sup> This is a clear technique to emerge from the discussion on the TA 2006 in particular in light of 90 day detention.

<sup>489</sup> HC Vol. 375, Col. 65, E. Garnier.

‘willing to take on trust and for the first time being the judgement made by the Home Secretary, as he is in a position – whereas I am not – to understand what is urgent and where the loopholes are’.<sup>490</sup>

This position adopted by the main opposition party arguably fuelled the executive with a sense of belief that the measures contained within the ATCSB 2001 could remain and do so without the need to provide proof; particularly dangerous with such invasive measures requiring derogation. By adopting this position, Mr Letwin failed to provide necessary checks on the executive, undermining his duty and obligation to challenge executive action by substantiating his position on the ATCSB 2001 based on ‘trust’.

Trust without evidence was demonstrated on more than one occasion by the Shadow Home Secretary, emphasising the decision to protect public security.

‘The Home Secretary believes he needs powers to protect us against appalling attack on our fellow citizens. I am unwilling on behalf of my party to put my country at the risk of the Home Secretary being proved right’.<sup>491</sup>

A brief interrogation of the need for the legislation containing non-emergency provisions was presented here<sup>492</sup> however, challenge to the issue of trust was specifically raised by Mr Menzies Campbell.<sup>493</sup> This particular interjection moved debate away from the rationale for derogation based on evidence or truth and refocused debate on the constitutional principle of parliamentary checks and balances responsibilities.<sup>494</sup> The caveat to ‘trust’ lay in the presupposition of the ‘urgent threat’ - a threat which had still yet to be substantially proven against the UK. Nonetheless, irrespective of the threat, checks and balances should have been upheld through oversight mechanisms. Without checks and balances a blurring of procedure can occur and processes, such as the separation of powers, become contaminated resulting in potentially damaging legislation.

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<sup>490</sup> HC Vol. 375, Col. 40, O. Letwin. D. Grieve uses a different rhetoric with the same outcome which identifies that the House ‘must to an extent, accept the information given to us by the Home Secretary that the threat is real and serious’. (HC Vol. 375, Col. 110).

<sup>491</sup> HC Vol. 375, Col. 40, O. Letwin.

<sup>492</sup> Challenge came from G. Dunwoody (HC Vol. 375, Col. 40).

<sup>493</sup> HC Vol. 375, Col. 41, M. Campbell.

<sup>494</sup> HC Vol. 375, Col 41, M. Campbell. The position of trust is also fielded by E. Garnier (HC Vol. 375, Col 64). E. Garnier accepts that not everything can be conveyed to the House due to the sensitivity of material but that the Home Secretary needs to be more open to avoid ‘insulting’ the very people whom he needs to apply and carry through his new restrictive provisions.

'Threat' became the paramount justification for derogation. With no formula available for either house to assess the nature of the threat or emergency, parliament was forced to analyse with limited substance. Focusing on the boundaries for derogation, Mark Fisher confirmed that derogation was permitted 'in times of war or other public emergency threatening the life of the nation'.<sup>495</sup> In his opinion, the fact that people were 'queuing to see the new Harry Potter film and carrying out their Christmas shopping' demonstrated that the UK was not currently facing a threat to the 'life of the nation' – the prerequisite for justifying derogation.<sup>496</sup> Adopting a literal meaning to the interpretation of public emergency was a notion which the Home Secretary later identified as not performing a practical analysis. Although this visual assessment by Mr Fisher was evident, Stephen McCabe identified a theoretical threat framework questioning how many attacks like that witnessed on the US could the UK sustain before the claim that the nation was being threatened was accepted.<sup>497</sup> With a lack of substantive evidence other than the events of 9/11, the search for proof became blurred by 'national emergency', threat, and the new situation inclusive of the war paradigm explored by Hoffman.<sup>498</sup>

Faced with continued problems of the fluidity of 'security', the Home Secretary noted the:

'Life of the nation was not immediately disrupted by a change in people's behaviour, it should not be assumed that people did not believe that there is and remains a threat to the life of the nation...I believe that the threat has not diminished. I take the same view now as I took the day after 11 September. The question that must be answered is whether people think that what we are seeking to do under part 4 is justified if a substantial attack took place now. I suggest that they would. Taking action to preclude that threat to the life of the nation has to be the right thing to do, rather than taking the action after the life of the nation has demonstrably been threatened'.<sup>499</sup>

The Home Secretary incorporated a number of factors into this extension of power, namely, his position and assessment as Home Secretary, the public opinion and view of the situation

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<sup>495</sup> HC Vol. 375, Col. 76, M. Fisher.

<sup>496</sup> HC Vol. 375, Col. 76, M. Fisher.

<sup>497</sup> HC Vol. 375, Col. 76, S. McCabe.

<sup>498</sup> Hoffman, P. (2004); Human Rights and Terrorism. Pp. 939-940.

<sup>499</sup> HC Vol. 376, Col. 918, D. Blunkett.

currently underway, and the need for pre-emptive action to avoid risk to the nation. To be seen responding to public needs was crucial in the political game. The importance of political duty made objective assessments of the legislation difficult.<sup>500</sup> As such, the importance of the second chamber in performing checks, balances and scrutinising legislation emerges. This is most notable by their comparatively more structured approach to reviewing legislation than observed in the examination of the House of Commons.

Concerns and expert opinions were also being compiled outside of parliament and introduced at various junctures throughout debate, inclusive of the implications that derogation could have in future assessments. Interpretations of the impact of moves filtered into debate were used to challenge the executive:

‘Has the Home Secretary read the comments of David Pannick QC, one of the country's leading barristers, that the derogation from Article 5 is unlawful because, first, the ECtHR is unlikely to accept that we face a public emergency threatening the life of the nation and, secondly, even if it did accept that, the Government will not be able to establish to the Court's satisfaction that detention without trial is strictly required by the exigencies of the situation? Can the Home Secretary assure us that David Pannick is wrong in his interpretation of the law’.<sup>501</sup>

The identification of two potential problems demanded proof of a ‘national emergency’ to be demonstrated. As with all other concerns raised, the response from the executive remained that following consultations with international lawyers and discussions with the AG, the threat remained, therefore, validating the clauses within the ATCSB 2001. Hence, in the opinion of the Home Secretary, Mr Pannick’s assessment was not relevant to the situation faced by the executive.<sup>502</sup> Again, the Home Secretary had failed to answer the question laid before him in explicit terms implying and relying on the events of 9/11 to ‘prove’ that a state of emergency existed and, further, apparently asking parliament to consider how the UK could possibly ‘not’ be in a state of emergency following such events.

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<sup>500</sup> HC Vol. 375, Col 115, B. Hughes.

<sup>501</sup> HC Vol. 376, Col. 916, G. Osborne.

<sup>502</sup> HC Vol. 376, Col 916, D. Blunkett.

Following the general (and notably sporadic) debate over necessity for derogation which remained unsubstantiated, two clear challenges emerged regarding derogation by the UK. Firstly, the presentation of alternatives to derogation and secondly, the challenge as to why the UK was the only country pursuing derogation.

Alternatives to derogation were presented by both major opposition parties. Presenting an alternative which would avoid derogation altogether and bring the UK in line with moves made by France, George Osborne suggested that:

‘We have already gone through the steps of derogating from Article 5 of the ECHR, and I have yet to hear a convincing explanation from a Minister of why we cannot go through the process suggested by my hon. Friend the Member for West Dorset (Mr. Letwin), which is to withdraw from the European Convention for a split second and rejoin with reservations, which are exactly what France has. By doing so, we would be dealing with the root cause of all the problems that we have been discussing today and on Monday—the conventions that we have signed up to and the way in which they are interpreted by lawyers—and we would have no need to twist our domestic laws and liberties’.<sup>503</sup>

Reservations about the necessity to derogate continued. Simon Hughes noted:

‘We would be wrong to derogate from the ECHR and from the HRA 1998. Nothing that the Home Secretary has said about the issues on which we agree—for example, that there remains an international threat, which I accept without qualification—persuades me that that takes us into the criteria for qualifying for derogation. The two tests have been set out: there has to be a public emergency threatening the life of the nation, and the resultant action has to be action strictly required by the exigencies of the situation. Like David Pannick, whom we all respect as an authority, the Liberal Democrats' view is that those tests are not met’.<sup>504</sup>

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<sup>503</sup> HC Vol. 375, Col. 394, G. Osborne.

<sup>504</sup> HC Vol. 376, Col. 924, S. Hughes.

This position reinforces that derogation would be applied with or without substantial evidence to support the necessity of moves.<sup>505</sup>

A position was presented earlier by Bob Spink who noted that a better way to deal with the problems outlined within Part 4 would be for the Government to use Articles 57 and 58 of the ECHR to gain 'reservation against Article 3, so that those threatening national security could be deported to countries such as the USA or India'.<sup>506</sup> This alternative was also considered by the Shadow Home Secretary. According to Oliver Letwin, this alternative would allow the UK to engage in an 'inelegant manoeuvre to remove ourselves for a millisecond and re-enter with a reservation'<sup>507</sup> similar to that entertained by the French. Avoiding this alternative in favour of derogation, Mr. Letwin suggested that the Home Secretary was creating a situation in which he was willing to put at some risk our 'civil liberty precedents and our safety as far as appraisals are concerned simply to avoid that inelegance'.<sup>508</sup> The Home Secretary's public refusal to remove the UK from the ECHR received support from the Liberal Democrat benches.<sup>509</sup> The position reiterated by Mr Osborne removed the UK from Article 3 restrictions. With this removal, the return of non-nationals would no longer be dependent on subjective interpretation and would allow the UK to protect her borders as seen fit.<sup>510</sup> Although rejected, this position displays that

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<sup>505</sup> Comparison with the system adopted in France must be used with caution. George Osborne in his assertion suggests that the UK and French systems are comparable which is not as simple as that presented here, a fundamental difference being France having a written constitution and operating with constitutional courts. With such constitutional differences, this comparison is not as clinical as presented here.

<sup>506</sup> HC Vol. 375, Col. 42, B. Spink.

<sup>507</sup> HC Vol. 375, Col. 50, O. Letwin.

<sup>508</sup> HC Vol. 375, Col. 50, O. Letwin. This position was also revisited by S. Hughes (HC Vol. 375, Col. 60).

<sup>509</sup> This was also seen in the House of Lords. Lord Mayhew of Twysden noted that 'Some people argue that the Government had more than one alternative. It is said that, by some fancy footwork, the Government could have denounced the whole Human Rights Convention, then—in a twinkling of an eye—re-entered it with a reservation on Article 3, which guarantees the right to life. That way, they could lawfully deport a suspect in the sure and certain expectation that he would lose his life at the other end or at least be tortured. Even if that approach had worked, I should find it disreputable and unworthy—and I believe that the country would have done so' (HL Vol. 629, Col. 196, Lord Mayhew of Twysden); Baroness Buscombe presented the alternative to derogation (HL Vol. 629, Col. 274); Lord Goldsmith argued that temporary withdrawal with reservations was not acceptable (HL Vol. 629, Col. 1006).

<sup>510</sup> Because of the incompatibility of clause 23 ATCSB 2001 with Article 5(1) ECHR some Conservative members of Parliament wanted Home Secretary Blunkett to consider withdrawing from the European Convention altogether. See Patrick Wintour, 'Blunkett Rejects "Airy Fairy" fears', *The Guardian* 12 Nov. 2001.

alternatives to derogation were presented to the house yet, rationalisation in favour of derogation remained.<sup>511</sup> As identified by Lord Goodhart:

‘the idea that the ECHR is something which we can leave and return to at will, as suggested by the noble Lords, Lord Dixon-Smith and Lord Waddington, is completely unacceptable and unrealistic. That is especially so if the purpose is to allow suspects to be sent back to death or torture. That would be far worse than keeping people here in detention’.<sup>512</sup>

This response was made in light of the concerns raised by the Lord Dixon-Smith that the reason the UK had found herself in this situation, unlike other European nations, was the result of the UK’s failure to enter reservations before signing up to the ECHR.<sup>513</sup>

This raised the concern as to why the UK would derogate whilst other nations did not require such moves. Mr Corbyn asked:

‘Will the Home Secretary explain why this country, almost alone in Europe, is proposing such draconian measures and derogation from human rights conventions when other countries believe that their criminal law is sufficient to deal with the threat’?<sup>514</sup>

The defence of moves immediately turned to the ‘threat’ which the UK faced, heightened by the alliance the UK had with the U.S. In response to this threat the Home Secretary indicated that:

‘We need to update our preparedness, our legislation and our actions against terrorism—even in a way that has been denounced by other countries, including

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<sup>511</sup> HC Vol. 376, Col. 924, S. Hughes – rejection on behalf of the Liberal Democrats for the Conservative position. It also identifies that the Bill may have been less draconian than the potential scope for moves could have been.

<sup>512</sup> HL Vol. 629, Col. 271, Lord Goodhart.

<sup>513</sup> HL Vol. 629, Col. 156, Lord Dixon – Smith.

<sup>514</sup> HC Vol. 376, Col. 916, J. Corbyn; S. Hughes (HC Vol. 376, Col. 924); A. Ewing (HC Vol. 375, Col. 396); J. Corston (HC Vol. 375, Col. 84); R. Shepherd (HC Vol. 375, Col. 99), Mr E. Llwyd, (HC Vol 375, Col. 25) M. Fisher (HC Vol. 375, Col. 76), K. McNamara (HC Vol. 375, Col. 81).



those to which my hon. Friend refers—and to reflect the nature and the response to the threat to the United States and elsewhere’.<sup>515</sup>

Threat is underpinned by the apparent risk assessment. ‘Risk’ is a generic indicator for a number of reactions and moves, but risk in real terms was not presented anywhere. Due to the fact that the Home Secretary believed risk existed as the result of the alliance which the UK had with the US, the UK was forced to respond in a different way to other nations constrained within the same supra-national framework. As with other justifications by the Home Secretary for extension of measures, evidence in support of these request were absent.

Debate on the decision and necessity to derogate from the ECHR transcended a variety of considerations to the overall issue. This appeared to be underpinned by members unconvinced by the need for clauses 21 and 23 ATCSB 2001. The inability to substantiate necessity for these clauses had the effect of undermining the necessity for derogation. A lack of clarity in the structure of debate allowed for regurgitation of weak justification to be applied to a number of questions raised, most notably the generic use of the ‘threat’ which existed. As acknowledged earlier,<sup>516</sup> this lack of challenge to dismantle the underlying composition of threat substantiated by the notion of ‘trust’ in the Home Secretary allowed the executive to craft a position whereby significant challenge would, in the timeframe available and the circumstances documented, seem unlikely to occur. Most notably, rights and security balance, whether conceptually or physically, did not appear to emerge on this specific area of debate.

As noted earlier, separate debate took place in the House of Commons entitled ‘Human Rights’. Although this falls outside of the initial scope of this examination, failure to provide a brief review could lead to incorrect assertions made in the final analysis of this thesis. On review of this debate it emerged that the focus was on the ‘necessity’ for derogation. Although this theme emerged within the debate examined above, it is interesting to note how a debate not exclusive on the legislation raises a number of points to address a fundamental concern in the legislation reviewed in this chapter. On behalf of the executive, Beverley Hughes informed the House of Commons of their interpretation of the ECHR

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<sup>515</sup> HC Vol. 376, Col. 916, D. Blunkett.

<sup>516</sup> Pp. 143

provisions. Dialogue in this particular debate was limited to a few speakers and, whilst the length of debate was brief, the issues raised remain pertinent to the overall aim of identifying if a balance was made within parliamentary debate. This debate will now be briefly examined.

#### **4.7 Human Rights discussion. 19<sup>th</sup> November 2001:**

Beverley Hughes was explicit in indicating that the UK faced a public emergency within the meaning of the Convention ruling out a reduction in threat following the events in Afghanistan.<sup>517</sup> Confirmation of 'risk' was challenged by Mr Fisher who expressed that the test for national emergency which threatens the 'life of this country' had to be far more substantial than a simple recognition of 'risk'.<sup>518</sup> Failing to present clear evidence that the nation was under sufficient threat to warrant derogation, Ms Hughes indicated that in the view of the executive the threat of life to the nation existed, reaffirmed as it was identified by the JCHR that there could be specific information which judgements were based on that could not be shared.<sup>519</sup>

Necessity of derogation based on the powers of detention was considered limited, as powers of detention already existed under Article 5(1)(f) ECHR. Nonetheless, Ms Hughes indicated that the executive;

'believe that the powers available already under Article 5(1) to detain somebody, pending effecting their removal, would not be sufficient for the periods that may be involved when there is no third country to which we can deport that person. That is why we propose derogation, so that we do not risk falling foul of Article 5(1) in those circumstances'.<sup>520</sup>

This particular observation raises concern, not only of 'risk' from terrorism, but also the 'risk' of breaching the ECHR. It is unsurprising that, when interpreted in this manner, justice has to find a balance which in this instance fell on the necessity of derogation.

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<sup>517</sup> HC Vol. 375, Col. 127, B. Hughes.

<sup>518</sup> HC Vol. 375, Col. 127, M. Fisher.

<sup>519</sup> HC Vol. 375, Col. 128, B. Hughes.

<sup>520</sup> HC Vol. 375, Col. 129, B. Hughes.

For Ms Hughes, threat to the nation existed as evidenced by attacks on the USA. This satisfied the second test for derogation under Article 15 ECHR, qualifying that the response (detention) was *necessary* and *proportionate*. Ms Hughes claimed these to be so because;

‘We must do something to protect the public against individuals who contribute to the terrorist threat. If it is not possible to present sufficient admissible evidence to bring a successful criminal charge, and if legal or practical considerations prevent removal from the UK, another option needs to be found’.<sup>521</sup>

It was also confirmed that the move was proportionate based on the small group of individuals the powers would be used on and where prosecution was an option it would be pursued.

Safeguards to measures contained within the ATCSB 2001 were presented by the executive. One safeguard was the opportunity for detainees to leave the UK at any point. Unlike previous discussions, challenges were explicitly made on the prospect of terror suspects roaming free.<sup>522</sup> The safeguard of judicial scrutiny was also presented via the SIAC supplements by the obligations of the sunset clause allowing for review of powers with a five year expiry order.<sup>523</sup>

One discussion which ran throughout debate<sup>524</sup> was on extension of powers beyond those of other European nations, in this instance the need to derogate. Ms Hughes noted:

‘Different sets of legislation in other European countries mean that the contexts are different. Each country must evaluate the risk that it perceives and make a judgment about the measures that are necessary, which is what we are doing here’.<sup>525</sup>

As established in Chapter Two there are various connotations to the influence of risk, including proximity of threat, type of threat, awareness of the uncertain and indiscriminate threat and the perceived risk inclusive of its international dimension and the

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<sup>521</sup> HC Vol. 375, Col. 128, B. Hughes.

<sup>522</sup> HC Vol. 375, Col. 130, M. Fisher.

<sup>523</sup> HC Vol. 375, Col. 130, B. Hughes.

<sup>524</sup> HC Vol. 375, Col. 130, K. McNamara; HC Vol. 375, Col. 136, G. Allen; HC Vol. 375, Col. 139, N. Baker; HC Vol. 375, Col. 141, B. Gummer.

<sup>525</sup> HC Vol. 375, Col. 127, B. Hughes.

acknowledgement of quantifiable risk.<sup>526</sup> Whatever position is ascertained from this array of influences, proof and justification for decisions must be identified. As noted by Suskind, 'if we wait for threats to fully materialise, we will have waited too long'.<sup>527</sup>

The request for proof continued to dominate concerns. James Paice identified that there were materials and evidence not accessible to the House upon which decisions had been made by the executive. Whilst supporting the need to prosecute where possible, the question still remained how to respond in situations where 'evidence' was unavailable. Identifying the existence of a balance, Mr Paice noted:

'We accept that there are cases in which the evidence is strong but may not be strong enough for a conviction or in which no offence under current British law has been committed. The question therefore is how we deal with such cases. Can any responsible politician say that, despite strong evidence, the liberty of an individual is more important than the security of the vast majority of the people? That is the invidious balance that we have to strike, but it is one that a Home Secretary in any Government always has to strike in a number of ways'.<sup>528</sup>

As previously mentioned, the influence of case law penetrated debate. Focusing on the judgements in *Soering* and *Chahal*, Mr Paice noted:

'Judges have interpreted Article 3 in a way that was not intended. We agree. In fact, the Home Secretary has for months been making speeches and writing articles bemoaning the power of judges, rather than Parliament, to make law. Although I do not in any way accept all his strictures, we will nevertheless offer him the opportunity to reassert the will of Parliament over the judges' interpretation of Article 3'.<sup>529</sup>

The restrictions on deportation and extradition rules were further pushing the UK to act in a cataclysmic way. As Mr Gummer noted;

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<sup>526</sup> Beck, U. (2002); *The Terrorist Threat: World Risk Society Revisited*. Pp. 40-41.

<sup>527</sup> Suskind, R. (2006); *The One Percent Doctrine: Deep inside America Pursuit of its Enemies Since 9/11*. Pp. 149.

<sup>528</sup> HC Vol. 375, Col. 132, J. Paice.

<sup>529</sup> HC Vol. 375, Col. 133, J. Paice.

‘We now have a ludicrous situation in which we are busy trying to kill bin Laden directly, but if he were to arrive in this country we would not be able to send him to the US in case he was killed after the due process of law’.<sup>530</sup>

This does not justify moves, nor identify risk or establish threat but, when assessing proportionality of moves, this influence may strike a legitimate chord in the balance.

There is a clear indication that this debate addressed rights and security.

‘The Government are using their muscle today to force the House to extinguish for certain people a fundamental liberty. The House should have been enabled to do everything it could to satisfy itself that the measure is necessary for the prevention of greater evil. Although the penalties are to be applied to foreign nationals, we owe them the same duty to scrutinise and question the measure as we owe our own citizens and constituents’.<sup>531</sup>

Norman Baker drew a number of the issues identified already through the debate and consolidated them into one dissenting argument against the moves. Mr Baker condemned the impact these moves would have on the rights and lives of individuals indefinitely detained, even if only a handful. He raised concerns about the lack of proof of an emergency protected by the façade of secret evidence summing that ‘We may be at risk from terrorists, but the civil liberties of this country are more at risk from the Home Secretary’.<sup>532</sup>

### **Conclusion:**

As noted by Walker,<sup>533</sup> the 2001 legislation can be explained by three motives. The first was the growing awareness that the threat of terrorism was changing. This position was clearly evidenced by the claims of the Executive following the events of 9/11. Secondly was the awareness of the external threat. This awareness led to the apprehension that al Qaeda related activities had been occurring within the UK for a number of years, although this was considered to be an infiltration from non-nationals. The third motivation identified by Walker was a more generalised concern to increase security and to reassure the public. The

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<sup>530</sup> Ibid.

<sup>531</sup> HC Vol. 375, Col. 137, G. Allen.

<sup>532</sup> HC Vol. 375, Col. 139, N. Baker.

<sup>533</sup> Walker, C. (2004); *Terrorism and Criminal Justice: Past, Present and Future*.

‘need to be seen’ to be acting was documented by a number of MPs within the debate; it also, as Walker noted, represented a ‘fundamental switch away from reactive policing of incidents to proactive policing and management of risk’.<sup>534</sup>

Each of these influences identified by Walker fed into the wider picture of the ATCSB 2001 which consequently fostered the need for derogation to be entered in to. A number of issues were raised by the need for derogation. Some concerns received limited disclosure for their incorporation in the Bill. Whilst concerns were raised, lack of measurable justification remained evident. As noted:

‘At time and debate of derogation the House of Commons Defence Select Committee found that "there remains no intelligence of any specific threat to the UK at present", but it accepted that there is a continuing threat’.<sup>535</sup>

Threat assessments by the UK were made in line with the U.S. The questions raised in debate focused not on the existence of threat or risk but on proof of its substantive nature to warrant moves:

‘Members on both sides of the House agree that we are under threat from terrorism—the whole world is under threat from terrorism, this country perhaps more than most others apart from the United States. We were under threat from terrorism before 11 September, and that threat may have increased since, but that is not the test for derogation. Mr Pannick and others who support him say that the test is not whether we are under threat from terrorism, but whether the threat is so severe that it threatens the life of the nation. Nothing the Home Secretary has said on Second Reading, in Committee or tonight takes that necessary step to extend the threat of terrorism, which obviously exists, to a threat that threatens the life of this nation’.<sup>536</sup>

In an attempt to provide some depth for the executive position, the Home Secretary provided a crude assessment of the impact which the events of 9/11 had, not only on the US, but also the world. The context of a ‘national emergency’ was framed, not in the act of

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<sup>534</sup> Ibid. Pp. 313-314.

<sup>535</sup> JCHR, Reports on the Anti-terrorism, Crime and Security Bill (2001-02). Para. 78.

<sup>536</sup> HC Vol. 376, Col. 917, M. Fisher.

terrorism alone, but in the repercussions it perpetuated. The Home Secretary also documented that he could not guarantee whether an attack would happen, nor could he guarantee that one would not, placing the onus of balance back into the hands of parliament.<sup>537</sup>

In discussion on the protection of rights the JCHR were more rigorous, structured and substantive in analysis than either Houses of Parliament.<sup>538</sup> However, as the JCHR pointed out, the House of Commons received only 16 hours to deal with 126 clauses and eight schedules, which may have hampered the ability to examine debate.<sup>539</sup> The JCHR had recognised in its conclusions that the Government had made a sincere effort to safeguard rights while addressing the threat'.<sup>540</sup> Nonetheless, 'sincere effort' demonstrated by the executive failed to prevent continued concern by MPs and academics regarding the impact Part 4 may have on rights; the result of the remaining lack in clarity to demonstrate that the derogation was strictly necessary to meet the exigencies of the situation. As noted earlier<sup>541</sup> this appeared to be underpinned by members unconvinced by the need for clause 21, 23 and their associated provisions. The inability to substantiate necessity for these clauses had the effect of undermining the necessity for derogation compounded further by the lack of proof. As Lord Lester of Herne Hill identified:

'The JCHR said in both its reports that it was not persuaded that the conditions for derogation had been sufficiently explained to parliament'.<sup>542</sup>

This inability to prove moves were 'necessary' remained a constant feature throughout examination.

In justifying the executives' decision to create Part 4 with the consequence of derogation, it was identified that a government had 'no greater obligation than to defend the nation state against armed aggression'.<sup>543</sup> Whilst interpretation might be digested by members of parliament morally or theoretically, this obligation must still be necessary and proportional

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<sup>537</sup> HC Vol. 376, Col. 917, D. Blunkett.

<sup>538</sup> HL Vol. 629, Col. 545, Lord Rooker.

<sup>539</sup> Para 2, JCHR 2<sup>nd</sup> Report, 2001

<sup>540</sup> HL Vol. 629, Col. 278, Lord Goldsmith.

<sup>541</sup> Pp. 140

<sup>542</sup> HL Vol. 629, Col. 1002/3, Lord Lester of Herne Hill.

<sup>543</sup> HL Vol. 629, Col. 233, Lord Marlesford.

to the threat from the armed aggression of which Lord Marlesford spoke. This is where this thesis aims to address the balance between rights and security and examine emergent themes used to warrant, justify, support or reject positions based on intelligent and rigorous review. Such rigorous review, however, appeared to be insufficient comparative to the infringements and compromises placed on rights. This is not to say that the outcome of decisions would have been any different had greater assessment of evidence, legality and expert advice been given, but this exploratory investigation suggests that the evident lack of rigour and assessment undermined the true balance necessary to justify infringements on rights instigated as the result of the ATCSA 2001.

Whilst other measures may have been presented, the executive:

‘Believed that they had struck the right balance between individual liberties and the necessary protection of the people of and in this country, and a proportionate and appropriate response’.<sup>544</sup>

However, even this need to protect the state against threat still required balance and legitimacy. Lord McNally expressed to the House that:

‘no one on these Benches underestimates the threat to our society posed by international terrorism...The Minister rightly reminded us of the events of 11th September and of the new rule book which terrorists wrote on that day... Given what the American security services call “a clear and present danger”, it would be totally irresponsible for the Government not to tighten our defences. They have our full support in so doing. But they need proportionality’.<sup>545</sup>

This reaffirmed that the moves were not considered inappropriate providing they could be justified and were proportionate. It may be argued that this was an underlying issue with concern not for moves but the unjustified extension of power.

Debate on security and rights appeared throughout discussion. Balance, compromise and proportionality all rely on individual interpretation of the evidence. The greater the evidence to support a position, the more democratic and legitimate the concept becomes,

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<sup>544</sup> HL Vol. 629, Col.278, Lord Goldsmith.

<sup>545</sup> HL Vol. 629, Col. 160/1 Lord McNally.



fitting within the liberal constitutional framework as identified by Barry.<sup>546</sup> However, as has been seen in this examination, evidence from both sides of debate was weak, limited and often repetitive.

More obvious in the House of Lords than from the analysis on the House of Commons, is the requirement for the executives to 'prove' the need for the moves. Lord Hylton notes:

'I believe that the burden is on the Government to justify the acts miscellaneous contents. The first question that comes to my mind is whether a genuine public emergency, threatening the life of the nation, actually exists here now. I simply say that qualified opinions differ very much on that subject'.<sup>547</sup>

This point of proving that moves were necessary was a factor advocated throughout the gestation of this analysis. It was later presented that parliament existed 'not to trust but to scrutinise', however, in the event of an urgent threat, responsibility to the people would be paramount.<sup>548</sup>

Two tests were set out: there had to be a public emergency threatening the life of the nation, and the resultant action had to be strictly required by the exigencies of the situation. As Simon Hughes noted 'like David Pannick, whom we all respect as an authority, the Liberal Democrats' view is that those tests are not met'.<sup>549</sup> Nonetheless, derogation remained part of the ATCSA 2001 receiving Royal Assent with the inclusion of the sunset clause.

In proving the UK was facing a public emergency the claim of the existence of an Article 15 ECHR emergency was not based on the actual existence of a 'public emergency', but rather the imminent threats from international terrorism. As the 'public emergency' was being claimed in relation to a threat, the UK bore a heavy burden to establish that it was facing the risk of an immediate execution of this threat. Yet, Home Secretary David Blunkett and several other government officials stated repeatedly on a number of occasions that there

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<sup>546</sup> Barry, B. (1995); Justice as Impartiality. Pp. 100.

<sup>547</sup> HL Vol. 629, Col. Col 240 Lord Hylton.

<sup>548</sup> The position of trust is also fielded by Edward Garnier (HC Vol. 375, Col. 64). Mr Garnier accepts that not everything can be conveyed to the House due to the sensitivity of material but that the Home Secretary needs to be more open to avoid 'insulting' the very people whom he needs to apply and carry through his new restrictive provisions.

<sup>549</sup> HL Vol. 629, Col. 924, S. Hughes.

was ‘no immediate intelligence pointing to a specific threat to the UK’.<sup>550</sup> If the threat was neither immediate nor specific, then how could there be a ‘public emergency threatening the life of the nation’?<sup>551</sup>

In demonstrating the proportionality of the measures found in ATCSB 2001 to satisfy that they were strictly required, the principle of proportionality required the government to demonstrate that the measures impaired the right at issue, in this case, the right to liberty and security, as little as reasonably possible in order to achieve the legislative objective. Proportionality may also be challenged based on the claim that, rather than the actual existence of a public emergency, in fact the alleged imminent threat required the government to prove the continuing operational effectiveness of the terrorist organisation.<sup>552</sup>

The legal validity of the decision to derogate remained problematic. As established, there was limited evidence to suggest that the UK faced a ‘public emergency threatening the life of the nation’ within the meaning of Article 15(1) ECHR. As discussed earlier,<sup>553</sup> justification for moves was calculated on the notion of imminent threat; a calculation however that remained unsubstantiated by evidence. This, in turn, undermined the claims that the UK faced a public emergency. The introduction of detention without trial as a result of the public emergency claim may have been considered as undermining long held principles upon which the UK had previously prided herself. This was further complicated by the potential for incompatibility with the ECHR Article 14 discrimination as only non-nationals were subjected to detention without trial; an issue which manifested itself later in the case of *Re A*.<sup>554</sup>

Outside of the debate on derogation two influences may be considered to have degenerated debate on Part 4 and the subsequent needs for derogation. First of these was the consideration that changes made to the Bill prior to the first reading may have

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<sup>550</sup> Wintour, P. (2001); ‘Blunkett Rejects “Airy Fairy” Fears’, *The Guardian*, 12 Nov.

<sup>551</sup> Michaelsen, C. (2007); *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? – A British-Australian Perspective*. Pp. 143.

<sup>552</sup> For further examination of the UK’s response to terrorism post 9/11, see: Michaelsen, C. (2007); *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? – A British-Australian Perspective*. Pp.144/145.

<sup>553</sup> Pp. 116

<sup>554</sup> Michaelsen, C. (2007); *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? – A British-Australian Perspective*. Pp. 148.

accounted for the limited parliamentary challenge to rights infringements. The changes made came with the backdrop of recommendations from the JCHR report. The second influence considered substantial in the limited review of rights and security to emerge from within this case study was the speed of the ATCSB 2001 through the Houses of Parliament. These two influences may not necessarily be independent of one another. Having made amendments based on the recommendations of the JCHR, the speed of the Bill may have led to a prioritisation to consider other issues which may not have been accounted for by the JCHR report. The timescale may have prevented scrutiny of the legislation and in particular the recommendations which had not been addressed by the Executive prior to the Bill's arrival in the Houses of Parliament. Specific to the issue of derogation Simon Hughes expressed:

‘We will consider a motion, which has an hour and a half for debate, on whether to support and agree to this country's derogation from Article 5 of the ECHR’.<sup>555</sup>

With such a limit on discussion, it is unsurprising that this examination has failed to extrapolate significant data from the case study.

This case study demonstrates challenges to complex legal interpretations, justifications and implementations but fails to evidence any explicit balance between the impact of rights and security compromised by the introduction of the measures. Further than this, challenges that were made appear not to be qualified within a rights or security framework, either theoretically or legally. The challenge within this particular case study appeared limp. This particular case study underpins the notion of De Londras<sup>556</sup> that parliament is perhaps not the best mechanism to adjudicate on issues of human rights.

A brief review of the case of *A v Secretary of State (Re A)*<sup>557</sup> will be undertaken. The decision in this case triggered the PTB 2005 following its declaration of incompatibility of Part 4 section 23 of the ATCSA 2001 rendering derogation unnecessary. The case is explored in some depth to examine the procedure applied by the court in arriving at their decision. This

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<sup>555</sup> HC Vol. 375, Col. 21, S. Hughes.

<sup>556</sup> De Londras and Davis. (2010); Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism’.

<sup>557</sup> [2004] UKHL 56.

will identify if the concerns raised by the courts were acknowledged within parliamentary debate.<sup>558</sup>

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<sup>558</sup> This will only be possible to assess based on the case study. It is accepted that a number of wider issues will be raised which cannot be addressed in this thesis.

## Prelude to Chapter Five:

### **A v Secretary of State [2004] UKHL 56, [2005] 2 AC 68:**

Case law provides us with an opportunity to see legislation working in practice. It is here that we turn to the discussion in *A v Secretary of State (Re A)*.<sup>559</sup> Following this decision a clear position on the balance between rights and security has been laid down by the Courts. The purpose of this examination is to identify firstly how the Lords arrived at the decision it made in *Re A*<sup>560</sup> and secondly to review the current position of the separation of powers on the issue of security and rights through case law. This will then lead us to the debate on the PTA 2005 which emerged as a result of this judgement.

The ATCSA 2001, included a sunset clause for ss 21–23. Although the introduction of Part 4 of the Act was the centre of considerable focus at the time of its introduction, its first renewal passed without the need for any vote in the House of Commons.<sup>561</sup>

*Re A*<sup>562</sup> provides a vivid demonstration of how if draft legislation fails to be scrutinised effectively, that the relationship between the executive, parliament and the judiciary can become strained. Ultimately the case of *Re A*<sup>563</sup> defines where the balance between rights (the individual) and security (the state) lay in the eyes of the law. The decision in the case was a majority of 8:1 declaring Part 4 of the ATCSA 2001 incompatible with the ECHR. Lord Bingham of Cornhill provided the majority judgment with Lord Walker of Gestingthorpe providing the dissenting judgment in favour of the Governments access to specialist knowledge.

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<sup>559</sup> [2004] UKHL 56.

<sup>560</sup> Ibid.

<sup>561</sup> Prevention and Suppression of Terrorism, House of Commons, 3 March 2003.

<sup>562</sup> [2004] UKHL 56.

<sup>563</sup> Ibid.

## **Re A:**

### **The Appeal:**

On arrival at the House of Lords the appellants were challenging a decision made by the Court of Appeal on 25<sup>th</sup> October 2002.<sup>564</sup> The Court of Appeal allowed the Home Secretary's appeal against the decision of the SIAC dated July 30<sup>th</sup> (2002) and dismissed the appellants cross-appeals against that decision. There were a number of common characteristics central to the appellants appeal. Firstly was that all of the appellants in question were foreign nationals; none of them had been the subject of a criminal charge nor any prospect of criminal charge existed; all were challenging the lawfulness of their detention and argued that the statutory provisions under which they had been detained were incompatible with the ECHR.

The main argument contended by all the appellants was that;

‘such detention was inconsistent with obligations binding on the United Kingdom under the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998; that the United Kingdom was not legally entitled to derogate from those obligations; that, if it was, its derogation was nonetheless inconsistent with the European Convention and so ineffectual to justify the detention; and that the statutory provisions under which they have been detained are incompatible with the Convention’.<sup>565</sup>

### **Background to the Case:**

Terrorism legislation had witnessed changes under the TA 2000 which was intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism. Following the attacks of 9/11, the Government reacted in two ways directly ‘relevant to the appeals’.<sup>566</sup> First there was the enactment of the ATCSA 2001 including Part 4; and secondly, the Government introduced the HRA 1998 (designated derogation) order 2001. The Secretary of State identified that first it was provided by para 2(2) of Schedule 3 to the Immigration Act 1971 that the Secretary of State might detain a non-British national

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<sup>564</sup> [2002] EWCA Civ 1502; [2004] QB 335.

<sup>565</sup> [2004] UKHL 56. Para 3.

<sup>566</sup> Ibid. Para 7.

pending the making of a deportation order against him. Para 2(3) of the same schedule authorised the Secretary of State to detain a person against whom a deportation order had been made 'pending his removal or departure from the UK'. In *Ex parte Hardial Singh*,<sup>567</sup> it was held that such detention was permissible only for such time as was reasonably necessary from the process of deportation to be carried out.

Ultimately under the Immigration Act 1971, there was no warrant for the long-term or indefinite detention of a non-national whom the Home Secretary wished to remove. Decisions made were consistent with obligations undertaken by the UK under the ECHR. Among these is Article 5(1) which guaranteed the fundamental human right of personal freedom.<sup>568</sup> This right of personal freedom however is not absolute and as such derogation under article 5(1)(f) is available although detention must only last during the deportation process and is not a warrant for 'long-term or indefinite detention'.<sup>569</sup>

Relying on the case of *Chahal v. UK*,<sup>570</sup> reference was made to Article 3 which identified that 'no one shall be subjected to torture or inhuman or degrading treatment or punishment', as such where detention proceedings were precluded by Article 3, Article 5(1)(f) would not sanction detention because the non-national would not be 'a person whom action is being taken with a view to deportation'.<sup>571</sup>

### **Majority Judgement:**

#### **Derogation Article 5(1):**

The UK is able to derogate from a number of articles within the ECHR. The governing provision for this is found in Article 15 of the ECHR 'derogation in times of emergency'. The UK enacted this power to derogate from Article 5(1)(f) of the Convention in the 2001 Act. The House of Lords in *Re A* examined this point in depth referring to a number of tests applied in cases including *Lawless v. Ireland*,<sup>572</sup> the *Greek Case*,<sup>573</sup> *Ireland v. UK*,<sup>574</sup> *Brannigan*

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<sup>567</sup> [1984] 1 WLR 704.

<sup>568</sup> It was noted that this must be read in the context of Article 1, by which contracting states undertake to secure the Convention rights and freedoms to "everyone within their jurisdiction".

<sup>569</sup> [2004] UKHL 56. Para 8.

<sup>570</sup> (1996) 23 EHRR 413.

<sup>571</sup> 23 EHRR 413 Para 113.

<sup>572</sup> (1961) (No 3) 1 EHRR 15.

<sup>573</sup> (1969) 12 YB.

and *McBride v. UK*,<sup>575</sup> *Aksoy v. Turkey*<sup>576</sup> and *Marshall v. UK*.<sup>577</sup> There are a variety of understandings adopted by Member States when examining what constitutes an ‘imminent threat’ or a ‘public emergency’. The Greek case,<sup>578</sup> remains an example of failure by a Member State to demonstrate ‘public emergency’ to the extent to warrant derogation from the ECHR whereas in *Ireland v UK* Article 15 had been satisfied on grounds of ‘a particularly far reaching and acute danger for the territorial integrity of the UK’.<sup>579</sup> This reiterated the complexities in identifying full proof arguments when applying for a derogation order from the ECHR – something which appears not to have been achieved fully in the eyes of the Lords when judging *Re A*.<sup>580</sup>

Lord Bingham reiterated the argument presented by the appellants in *Re A* <sup>581</sup> stating there was no public emergency on three accounts: if the emergency was not actual, it must be shown to be imminent, which could not be shown here;<sup>582</sup> the emergency must be of a temporary nature, which again could not be shown here; and the practice of other states, none of which had derogated from the ECHR, strongly suggested that there was no public emergency calling for derogation.<sup>583</sup> Neither imminence nor temporariness are expressed in Article 15 of the ECHR or Article 4 of the ICCPR, but have been treated by the ECtHR as a necessary condition of a valid derogation as well as from the Parliamentary JCHR who in its eighteenth report observed that ‘derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary’. With the position of other nations movement resolution 1271 adopted on 24<sup>th</sup> Jan 2002 by the Parliamentary Assembly of Council of Europe resolved that ‘in their fight against terrorism, Council of Europe members should not provide for any derogations to the ECHR’, calling on members

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<sup>574</sup> (1978) 2 EHRR 25.

<sup>575</sup> [1993] 17 EHRR 539.

<sup>576</sup> (1996) 23 EHRR 553.

<sup>577</sup> (2001) Appn No 41571/98.

<sup>578</sup> [1969] 12 YB.

<sup>579</sup> *Ireland v UK* (1978) 2 EHRR 25. Para 212.

<sup>580</sup> [2004] UKHL 56.

<sup>581</sup> *Ibid.*

<sup>582</sup> In submitting that the test of imminence was not met, the appellants pointed to ministerial statements in October 2001 and March 2002 ‘there is no immediate intelligence pointing to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally;’ and ‘it would be wrong to say that we have evidence of a particular threat’ *A and others v Secretary of State* [2004] UKHL 56 Para (21). It is worth noting that both these statements were made prior to the Bali bombing where the western agenda became a significant focus.

<sup>583</sup> [2004] UKHL 56. Para 20.



to refrain from using Article 15 of the ECHR.<sup>584</sup> Ultimately the JCHR, the Parliamentary assembly for the Council of Europe and the UN Human Rights Committee all expressed limits and reservations on the use by States of Article 15.

The Attorney General representing the Home Secretary responded to these points.<sup>585</sup> He submitted that an emergency could be properly regarded as imminent if an atrocity was credibly threatened by a body such as Al Qaeda which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. The government is responsible for the safety of the British people and need not wait for a disaster to strike before taking necessary steps to prevent it striking. The Attorney General also resisted the imposition of any artificial temporal limit to any emergency of the present kind. Finally the Attorney General argued that there was little point looking at other states as it was for each national government, as the guardian of its own peoples' safety to make its own judgment on the facts. The difference between the practice of the UK and other Council of Europe members' could be found in this countries role as a prominent enemy of Al Qaeda. The House of Lords rejected these positions and declared the derogation was indeed unlawful in favour of the appellants.

### **Proportionality:**

Proportionality will always be considered when looking for the balance between opposing elements. Article 15 requires that any measures taken by a member state in derogation of its obligations should not go beyond what is 'strictly required by the exigencies of the situation'. Proportionality issues in this case were raised over Part 4 ss 21-23 of the ATCSA 2001 as well as into the consideration of 'threat' which a nation faces. The appellants relied on the findings in *De Freitas v. Permanent Secretary of Ministry of Agriculture Fisheries, lands and Housing*,<sup>586</sup> in determining whether a limitation is arbitrary or excessive. In this case the court found that it must be questioned when considering limitation whether;

- the legislative objective is sufficiently important to justify limiting a fundamental right

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<sup>584</sup> [2004] UKHL 56. Para 12

<sup>585</sup> Ibid. Para 25

<sup>586</sup> [1999] 1 AC, 69, 80

- the measures designed to meet the legislative objective are rationally connected to it
- the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The appellants submitted that 'even if it were accepted that the legislative objective of protecting the British people against the risk of Al Qaeda was sufficiently important to justify limiting the fundamental right to personal freedom of those facing no criminal accusation, the ATCSA 2001 was not designed to meet that objective and was not rationally connected to it. Lord Bingham of Cornhill summed up the proportionality issue in seven points;<sup>587</sup>

- I. Part 4 of the ATCSA 2001 reversed the effects of Singh and Chahal (1996)
- II. The public emergency that the UK relied on for derogation was from the security of the UK presented by Al Qaeda terrorists and supporters
- III. While threat did come from foreign nationals, the threat to the UK did not derive solely from non-nationals
- IV. Sections 21-23 did not address (rationally) the threat to UK by Al Qaeda because (a) it did not address the problem by UK nationals; (b) it permitted foreign nationals to pursue activities abroad; and (c) sections 21-23 therefore permitted the detention and certification of persons who were not suspected of presenting any threat
- V. If the threat presented to the security of the UK by UK nationals suspected of being terrorists could be addressed without infringing their right to liberty, it is not shown why similar measures could not adequately address the threat presented by foreign nationals<sup>588</sup>
- VI. Since the right to personal liberty is among the most fundamental of rights protected by the ECHR, any restriction must be closely scrutinised by the national court
- VII. In light of scrutiny ss21-23 cannot be justified

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<sup>587</sup> [2004] UKHL 56. Para 31.

<sup>588</sup> Conditions of this kind, strictly enforced the court argued would effectively inhibit terrorist activity as proven by placing these restraints. Although a recent committee has identified that non-nationals placed under such orders have absconded. This identifies one of the problems with control orders compared to detention.

A number of these points will be examined briefly here.

On the issue raised in point (III) the House of Lords referred to the Newton Committee<sup>589</sup> drawing attention to paragraph 193 which identified that what was important was the nature of the threat, not the ideology behind it or the nationality of the perpetrator. The Home Office has argued that the threat from al Qaeda-related terrorism is predominantly from foreigners, but there is accumulating evidence that this. Following the Home Office claims that the threat from Al Qaeda was predominantly from non-nationals the Newton Committee found that there was evidence to suggest that this is no longer the case; with 30% of TA 2000 suspects in 2001 being British.<sup>590</sup> Whilst this indicates that the threat was not purely from non-nationals, the statistic presented by the Newton committee consequently confirmed that 70% of the total terror suspects arrested under the TA 2000 were non-nationals. The opposite to discrediting measures by the executive, with nearly three quarters of terror suspects arrested being non-nationals this may in fact enhance the executives decision to implement strict preventative measures on non-nationals.<sup>591</sup>

In point IV it was argued that the threat was not being addressed as moves made by ss 21-23 did not apply for certification and detention of nationals. Whilst the threat from UK nationals, was quantitatively smaller, it was not qualitatively different from that of foreign nationals.

The final point for discussion is point VI. The right to personal liberty has a long tradition in English law dating back to the Magna Carta. In its treatment of Article 5, the House of Lords found that the ECtHR had also recognised the prime importance of personal freedom in *Kurt v Turkey*<sup>592</sup> paragraph 22 indicating the need to interpret narrowly any exception to a 'most basic guarantee of individual freedom'. The AG challenged this submitting that it was for parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the Courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not

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<sup>589</sup> In common with previous emergency legislation, the ATCSA 2001 provided for an independent review. The Newton committee were appointed by the Home Secretary to the Review Committee in April 2002, charged with reporting to Parliament on the Act by December 2003.

<sup>590</sup> [2004] UKHL 56. Para 32.

<sup>591</sup> These figures however do not reveal conviction rates which would demonstrate the best form of identification from this in real terms.

<sup>592</sup> (1998) 27 EHRR 373.

judicial judgment. The House of Lords however followed the *ECtHR in Fette v France*,<sup>593</sup> maintaining that whilst any decision made by a representative democratic body must command respect, the degree of respect will be conditioned by the nature of the decision.<sup>594</sup> One may argue that this comparison is not reflective because of the constitutional difference highlighted earlier<sup>595</sup> between France and the UK with Article 3 ECHR. The Convention regime for the international protection of human rights requires national authorities, including national courts to exercise their authority to afford effective protection.<sup>596</sup>

### **Discrimination:**

The discussion on discrimination in this case was initially raised within the assessment of proportionality. Particular focus for this was on section 23 of the ATCSA 2001. The appellants argued that by being discriminatory, the section could not be 'strictly required' within the meaning of Article 15, and therefore was disproportionate. Discrimination was the main thread of the judgment in this case. The argument that Part 4 of the ATCSA 2001 was discriminatory was presented plainly and simply – treatment should not be different for suspected terrorists no matter what their country of origin may be. Lord Bingham of Cornhill posed the question whether persons in a relatively similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction, and whether, and to what extent differences in otherwise similar situations justify a different treatment in the law.<sup>597</sup>

In this case the appellants were treated differently from both suspected terrorists who were UK-nationals and who could not be removed and international terrorists who were not UK nationals but could be removed. Lord Bingham of Cornhill held there could be no doubt but that the difference of treatment was on the grounds of nationality or immigration status.<sup>598</sup> The Attorney General argued that a difference of treatment of the two groups was accordingly justified because there were non-nationals who could not be removed. The

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<sup>593</sup> (2002) 38 EHRR 438.

<sup>594</sup> [2004] UKHL 56. Para 39.

<sup>595</sup> Pp. 147

<sup>596</sup> [2004] UKHL 56. Para 40.

<sup>597</sup> Ibid. Para 50.

<sup>598</sup> Ibid. Para 51.

Attorney General relied also on the old-established rule that a sovereign State may control the entry of aliens into its territory and their expulsion from it.<sup>599</sup> He submitted that the Convention permits the differential treatment of aliens as compared with nationals. Even though in its resolution 1271 the Parliamentary assembly of Council of Europe recognised the obligation to take effective measures against terrorism, the restrictions on rights must be necessary and proportionate. In December 1985 the General Assembly of the UN recognised that States might establish differences between nationals and aliens but required that laws and regulations should not be incompatible with the interpretational legal obligations of the State. The biggest requirement was for enactments to meet any international obligations.

Finally the AG submitted that international law sanctioned the detention of aliens in time of war or public emergency, drawing attention to a number of instruments including (a) The Geneva Convention to the protection of Civilian persons in time of war (1949), (b) The Geneva Convention relating to the status of refugees – Article 9, (c) The Convention on the Status of Stateless Persons (1954), (d) The ICCPR Article 4, (e) The UN Declaration on the Human Rights of individuals who are not nationals of the country in which they live (1985), (f) EC treaty, (g) The ECHR Article 16, (h) reference made to United States authorities. The majority in this case believed that these materials were not enough to support the Home Secretaries advances, and a declaration of incompatibility was presented in respect of section 23 of the ATCSA 2001.

#### **Other Judgments:**

A number of Lords continued to add to the foundations presented by Lord Bingham of Cornhill. Lord Nicholls of Birkenhead reasserted that the governments' principle weakness lay in the different treatment accorded to nationals and non-nationals. Consequently, non-nationals may comprise the predominant and more immediate source of threat to national security, but they are not the only source.<sup>600</sup> Lord Nicholls of Birkenhead furthered that the right to individual liberty is one of the most fundamental freedoms, and detention without trial negates this. A controversial point was identified in paragraph 84 of the judgment when Lord Nicholls of Birkenhead expresses that the Government may have regarded the rights of

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<sup>599</sup> [2004] UKHL 56. Para 55.

<sup>600</sup> Ibid. Para 77.

non-nationals in this field as less weighty than the corresponding rights of nationals. Whilst this is only conjecture, the inclusion of this in Lord Nicholls of Birkenhead judgement leaves a key implication off of this claim unanswered; namely, if this were the case (that the rights of non-nationals a less weighty), then it should not be acceptable?

Lord Hoffman<sup>601</sup> reasserted the position of Lord Nicholls of Birkenhead of the ‘ancient values’ of liberty and analysed the State’s ability to derogate under Article 15 of the ECHR. His ultimate assertion came in paragraph 90 where he identified that until the HRA 1998 the introduction of powers of detention could not have been the subject of judicial decision; essentially there could be no basis for questioning an Act of Parliament by Court proceedings. This reiterated the impact that the introduction of the HRA had on the balance between the courts and the executive. It highlighted that the HRA had bridged the gap between the ECHR and domestic legislation providing the Courts with greater opportunity to martial law with wider international implications, a point reiterated earlier in the case of *Rehman*(2001).<sup>602</sup>

The only dissenting argument in this case came from Lord Walker of Gestingthorpe. For Lord Walker of Gestingthorpe the moves were reasonable and used responsibly. In the context of national security the number of persons detained is relevant and proportional.<sup>603</sup> Lord Walker of Gestingthorpe identified that the court should show a high degree of respect to the Secretary of States’ appreciation based on secret intelligence sources of the security risks.<sup>604</sup> Ultimately the court must allow for the fact that it may be impossible for the intelligence services to identify the target or predict the scale of the attack. Lord Walker of Gestingthorpe also relied on judgments made by some of the Lords in previous cases such as that made by Lord Hoffman in 2003. In his speech in the case of *Rehman*,<sup>605</sup> Lord Hoffman simply noted ‘if there is a danger of torture, the Government must find some other way of dealing with the threat to national security’. Ultimately this is what Part 4 of the ATCSA 2001 aimed to resolve. Issues over public emergency were identified by Lord Walker of Gestingthorpe in that a danger of terrorist action may be imminent even though there is

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<sup>601</sup> [2004] UKHL 56. Para 88.

<sup>602</sup> [2001] UKHL 47.

<sup>603</sup> [2004] UKHL 56. Para 218.

<sup>604</sup> *Ibid.* Para 196.

<sup>605</sup> [2001] UKHL 47. Para 193.

uncertainty as to when, where and how terrorists attack.<sup>606</sup> On the grounds of discrimination the difference for nationals and non-nationals has been described as technical. Lord Walker of Gestingthorpe diverted from this, arguing that it is by no means a technical concept but a fundamental difference in persons; British citizens have a right of abode; they cannot be deported. For Lord Walker of Gestingthorpe non-nationals had the option to leave, whilst detention without trial of a non-national terrorist suspect was a cause for grave concern; the judgment of parliament and the Secretary of State was that measures were necessary and the 2001 Act contains several important safeguards against oppression.<sup>607</sup>

### **Case summation:**

The case of *Re A*<sup>608</sup> went in favour of the appellants and a declaration under section 4 of the HRA 1998 was made that section 23 of the ATCSA 2001 was incompatible with articles 5 and 14 of the ECHR.<sup>609</sup> This case was a landmark decision in the debate of security and rights. Even though there was clear dissent displayed in both Houses of Parliament throughout debate on the ATCSA, this did not prevent it becoming law, nor were the controversial aspects amended. As witnessed in previous chapters, the balance and discussion on these areas was extremely limited. The proposals under Part 4 of the ATCSA 2001 evaded principals of judicial review and overlooked the potential compatibility and verification process that the SIAC could have on proceedings.<sup>610</sup> The fact that these issues were only acknowledged and not addressed demonstrates why processes such as the separation of powers are vital for checks and balances. The courts should not be seen therefore as competing against the functions of the Executive but providing a tier of challenge to prevent the executive acting ultra vires. *Re A*<sup>611</sup> demonstrates how the judiciary have been prepared to challenge long held assumptions that the executive have prerogative in identifying

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<sup>606</sup> [2004] UKHL 56. Para 208.

<sup>607</sup> [2004] UKHL 56. Para 217.

<sup>608</sup> [2004] UKHL 56.

<sup>609</sup> Ibid. Para 73.

<sup>610</sup> The government has well-established powers to deport non-nationals on grounds of national security and, so long as steps are being taken toward deportation, even detaining such individuals for several years may not violate the Convention. Such as under the 1971 Immigration Act.

<sup>611</sup> [2004] UKHL 56.

overriding factors.<sup>612</sup> The perceived nature of Part 4 of the ATCSA 2001 towards non-nationals left the judiciary with no option but to clearly indicate to the Government that Part 4 was incompatible.<sup>613</sup> Arguably the judiciary is not susceptible to the same day-to-day pressures that politicians are and as such maybe more inclined to make decisions based on fact as the legal experts. Politicians are more inclined to look to the immediate effect of their actions on public opinion and on the likelihood of their getting re-elected.<sup>614</sup> Because judges do not have this pressure, there is room for them to be brutal in the application of law and, where given weight by the HRA, also therefore the ECHR in domestic case law. Whilst the judiciary stated that the legislation was in violation of the Convention, the judgments identified a split in the reasoning as to why the legislation was wrong. This shows that the judiciary can be divided on issues, provide different reasoning, and yet still conclude the same decision, suggesting that at best there were more than one inconstancy with the ATCSA 2001.<sup>615</sup>

Having now reviewed the issues associated with the need for derogation and the case law which demanded a change in the ATCSA 2001 focus will now turn to look at the PTA 2005. This examination will follow a similar format to that presented in chapter four.

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<sup>612</sup> For further discussion on this see Poole, T., (2005) *Harnessing the Power of the Past? Lord Hoffman and the Belmarsh Detainees Case*.

<sup>613</sup> Hansard; HC Vol. 430; Col. 1436; Mr Harris; 'I was expressing disappointment that the Law Lords made that ruling in the first place, because I had hoped that taking the legal framework into account they would conclude that the existing arrangements were legal'.

<sup>614</sup> The re-election of politicians of played a key role in the influence of public interpretation of the moves undertaken by politicians, different to that of the House of Lords.

<sup>615</sup> Hansard; HC Vol. 430; Col, 1418; H. Blears; 'The existing powers have been subject to appeal. The Court of Appeal supported them unanimously; the House of Lords took a different view. Clearly, therefore, these are controversial matters, in both legal and political terms'.



# Chapter Five:

## The PTA 2005 – Control Orders:

**22<sup>nd</sup> February 2005** – PTB introduced to Commons floor

**23<sup>rd</sup> February 2005** – Second reading of the PTB

**28<sup>th</sup> February 2005** – Committee and remaining stages of PTB

**09/10<sup>th</sup> March 2005** – Consideration of Lords' amendments

**11<sup>th</sup> March 2005** – PTB receives Royal Assent

### Introduction to Chapter Five:

The following chapter will review discussion undertaken in the Houses of Parliament and the JCHR relevant to the PTB 2005. A brief socio-political background will be discussed providing a backdrop to the debate.

To maintain continuity across all assessments, a brief overview of key discussion points will also be presented. The aim of this is to demonstrate some intrinsic issues which stem from discussion but do not come to fruition in the case study but play an integral role in understanding the decisions arrived at by parliament. To omit such briefing could weaken analysis later in discussion.

Following this analysis, discussion will turn to the case study, reviewing control orders. Two themes will be specifically explored in this assessment of control orders. Firstly, the necessity for distinction between derogating and non-derogating control orders and secondly, a review of the debate undertaken on the powers extended to the Home Secretary in relation to control orders. As with the previous chapter it is important to note that discussion is thematic and not chronological.<sup>616</sup>

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<sup>616</sup> Logic of discussion raised throughout the debate was problematic in that there was often limited structure to the debate presented. It was often an opportunity for MPs to speak with no reference to the discussion previous to them, causing problems in keeping a logical assessment of the work.

## 5.1 Background to the PTB 2005:

The PTB 2005 was introduced in response to the ruling in *A and others v Secretary of State (Re A)*.<sup>617</sup> Following the detention of 16 non-nationals under Part 4 of the ATCSA 2001, a legal challenge was made arguing that detention without trial was unlawful. Part 4 section 23 of the ATCSA 2001 was subsequently declared incompatible with the ECHR. The introduction of the PTB 2005 was to allow the Home Secretary to impose control orders on individuals suspected of terrorism. Control orders aimed to satisfy the gap in legislation created by the declaration of incompatibility.

The government continued to base their argument for necessity of control orders on the threat to the UK; a reminiscent tone of that presented in the ATCSA 2001. Whilst scepticism remained over the credible threat to the UK, especially as this Bill was presented prior to the events of 7/7, Bamford suggests that evidence existed of specific and credible threats to the UK. Examples of these included: a plot to gas the London Underground in November 2002; the ricin plot that was uncovered in January 2003 resulting in the death of Special Branch detective Stephen Oake; and the security alert at Heathrow airport in February 2003, due to intelligence reports suggesting the possibility of terrorists targeting passenger aircraft with shoulder-fired surface-to-air missiles.<sup>618</sup> Threat to UK interests overseas was also clear. Since the introduction of the ATCSA 2001, among the 202 persons killed in the Bali bombing 24 were British tourists. In November 2003, suicide attacks against the British consulate, as well as the London-based HSBC bank in Turkey, were the first successful attacks that specifically targeted the UK and her interests abroad, resulting in 30 deaths.<sup>619</sup>

Following the introduction of the ATCSA 2001, the UK had also witnessed British citizens accused of terrorism overseas. Recent examples included Zacarias Moussaoui ("the 19th hijacker"), Richard Reid ("the shoe bomber"),<sup>620</sup> Ahmad Omar Saeed Sheikh (sentenced to death in Hyderabad in 2002 for journalist Daniel Pearl's murder), suicide bombings in Tel Aviv in April 2003 by Asif Mohammed Hanif and Omar Khan Sharif and the dozen British

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<sup>617</sup> [2004] UKHL 56.

<sup>618</sup> Bamford, B. (2004); *The United Kingdom's 'War against Terrorism'*. Pp. 738.

<sup>619</sup> *Ibid.* Pp. 739.

<sup>620</sup> He has been sentenced to life imprisonment: *The Times*, January 31, 2003. Pp. 1.

citizens detained in Afghanistan or Guantanamo Bay, Cuba.<sup>621</sup> The extent of planned attacks and atrocities, combined with evidence supporting increased awareness of British involvement in attacks, helped provide a backdrop for the executive to present such measures as those presented within the PTB 2005.

## **5.2 Key themes to emerge out of PTB debate:**

A brief overview of key areas of concern, aside from control orders, is presented here to acknowledge some wider issues associated with the case study in this chapter.<sup>622</sup> These are provided to support later analysis. As the previous chapter identified, it became apparent that, even though the House of Lords adopted a systematic approach in reviewing legislation, debate in the House of Commons was less structured. Lack of continuity in debate makes this brief overview integral in examining how justifications may have been formed. Two discussion points have been acknowledged here as issues which relate to the later discussion of control orders whilst assisting the review in light of security and rights.

Aside from the balance made between security and rights in relation to control orders, the establishment of whether a balance existed has been considered for a brief overview at this juncture. This was based on the significant influence this was deemed to have on the crux of debate. Sunset clauses have been reviewed as it became apparent that, where the balance was not right for some, the sunset clause provided a safeguard for securing a review.

### **5.2.1: Rights v Security; the establishment of 'balance':**

The balance of rights, liberties and security infiltrated the debate separately from that raised within control orders. In the debates infancy David Winnick noted:

‘The job of the Committee is to try to balance concern for civil liberties against the danger of terrorism. If we do not achieve a proper balance, we are not doing our job as Members of Parliament’.<sup>623</sup>

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<sup>621</sup> See R. (Abassi and another) v Secretary of State for the Foreign and Commonwealth Office [2002] EWCA Civ 1598.

<sup>622</sup> For an in-depth assessment of the wider issues associated with the PTA 2005 see Bates, E. (2009); Anti-Terrorism Control Orders: Liberty and Security still in the Balance.

<sup>623</sup> HC Vol. 431, Col. 694, D. - Winnick.

As previously established academics such as Lazarus and Goold have questioned whether ‘balance’ exists, however statements such as this confirm that elected members believe they have a duty to balance. A lack of clinical guidelines for the provision of balance fosters a purely subjective assessment based on the reviewers’ personal, moral and political framework and as such leads to research such as this.

In ascertaining this balance, it was identified that the role of the public was an influential factor and, as with the ATCSA 2001, particularly the *need* for the executive to be seen to be doing something.

‘We must never forget, as we consider the very important legal and other arguments about the balance of security versus the issue of individual liberty, that what the British people want us to do is to protect their national security’.<sup>624</sup>

Charles Clarke acknowledged the ‘needs’ of the British public inclusive of expectations about protection, Sir Patrick Cormack confirmed that it was not only the public who felt a need to do something, but political figureheads as well:

‘I saw, as I am sure almost everyone present will have done, the poll in The Daily Telegraph this morning, which showed a large majority of people taking the line, which broadly I take, that if it is necessary to sacrifice a little civil liberty for overall civil protection, then so be it’.<sup>625</sup>

Even though the public had been relied upon as a political tool, the JCHR, in its 10<sup>th</sup> report, reiterated that this was no longer an acceptable justification and, therefore, one which should not dictate a decision reached in political assessments.

Having acknowledged that a requirement for balance existed, and awareness that whether legitimately or not, the pressures of the public could and did influence some decisions, a briefing was provided that in ‘times of war’ the ‘balancing’ of rights, liberties, and security changes. A fundamental part of this balance, therefore, became the influence of the courts.

‘I have to say that there are a whole string of precedents to demonstrate that, in wartime emergencies, the courts have been reluctant to support civil liberties. As I

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<sup>624</sup> HC Vol. 431, Col. 772, C. Clarke.

<sup>625</sup> HC Vol. 431, Col. 748, Sir P. Cormack.

have said, we are now in a twilight position whereby we live in peacetime, but face emergencies. That poses a curious and difficult dilemma over the balance of judgment between preserving civil liberties and dealing with terrorist activities’.<sup>626</sup>

The concept of balance is subjective. There have been discussions on the potential for competing interests between the judiciary and the executive, particularly in light of the extension of powers provided as a result of the HRA. The influence of the courts was particularly prevalent in this debate based on the emergence of control orders resulting from the Law Lords decision in *Re A*.<sup>627</sup>

### **5.2.2 Sunset Clause:**

The sunset clause is acknowledged here because of the role it played in demonstrating that both Houses of Parliament were uncomfortable with such extension of powers. This position, in line with that demonstrated in the debate on the ATCSA, reiterated that whilst an extension of powers would arise, a review of such extension must take place. Reiterating both the dilemma of the situation faced and therefore the necessity of the sunset clause, Mr Heath noted:

‘The reason for having such a clause is very clear. The legislation is imperfect and it is being rushed through Parliament, yet it needs the proper attention of both Houses of Parliament. It has been brought forward in haste, simply because nothing was done for three years to correct the deficiencies of previous legislation. We now face an unacceptable potential hiatus in our protections against terrorism. That is why we need emergency legislation to go through, but equally why such legislation should lapse. The sunset clause is therefore crucial’.<sup>628</sup>

This position identifies a number of reasons for the sunset clause. Firstly, Mr Heath’s reference to the speed undermining the ability of Parliament to give proper evaluation of the Bill and, secondly, it highlights the inadequacies of the ATCSA 2001 requiring change. The reason why ‘we need emergency legislation’, however, is not clearly identified by Mr

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<sup>626</sup> HC Vol. 431, Col 739, W. Cash.

<sup>627</sup> [2004] UKHL 56.

<sup>628</sup> HC Vol. 431, Col. 1611, D. Heath.

Heath. It may well be the result of poor legislation or perhaps the decision made in *Re A*;<sup>629</sup> however, the unacceptable potential hiatus in our protections against terrorism demanded legislation. The requirement of such a clause, however, reiterated the defects within it.

‘The idea of a sunset clause weighs heavy on my heart because I think that the Bill should not be going through the House at all. I ask for a sunset clause only because it is a backstop so that we can reconsider such important issues at more leisure’.<sup>630</sup>

Views such as these highlight the mixed opinions which existed, demonstrating that a balance was explicitly made. For some, the balance was simply the protection of security balanced with the loss of rights for a small minority. This statement, however, also demonstrated that the balance for some MPs was somewhat more complex, with some choosing to rationalise their position based on the ‘best’ situation available under the circumstances.

As noted in the previous chapter, in pressing for a sunset clause the Bill became palatable for those who loathed it and, in its current state, functional for those supporting it. This is not to say, however, that it was accepted by all.<sup>631</sup> Two main practical concerns were raised within the debate on the sunset clause; firstly, the realistic implementation of the sunset clause and the review undertaken within it,<sup>632</sup> and, secondly, the practicalities of managing current detainees.<sup>633</sup> Neither of these positions carried particular force within the debate and will not be considered further here as, although essential to the liberty of those detained, it is not integral to the further analysis of the way in which laws were made.

### 5.3 JCHR:

The ninth report of the JCHR was limited in assessment, by its own admission.<sup>634</sup> The paper identified that its purpose was to provide:

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<sup>629</sup> [2004] UKHL 56.

<sup>630</sup> HL Vol. 670, Col. 892, Lord Clinton-Davis.

<sup>631</sup> HL Vol. 670, Col. 657, Lord Plant of Highfield.

<sup>632</sup> HL Vol. 670, Col. 659, Lord Dubs.

<sup>633</sup> HC Vol. 431, Col. 356, D. Hogg.

<sup>634</sup> Published on the 23<sup>rd</sup> February 2005.

‘A first indication for members, of human rights issues arising at the earliest opportunity in light of the very limited time available for parliamentary scrutiny of the Bill’.<sup>635</sup>

Consistent with its concern raised on the ATCSA 2001, emphasis on the speed of the PTB 2005 and the limited time for scrutiny were identified as weaknesses. Whilst only a preliminary report, it was identified early on by the JCHR that limited scrutiny of the legislation was a factor to be considered in the interpretation of the Bill. The paper identified four clear legal and constitutional positives from the proposed Bill:

- (1) The acceptance of the House of Lords’ judgement
- (2) The decision that, although the scale of the threat is such to amount to a public emergency threatening the life of the nation, at its current level deprivation of liberty cannot be strictly required
- (3) The decision to replace an inflexible system of detention without trial of non-nationals suspected of being international terrorists with measures which are both generally applicable to both nationals and non-nationals and capable of being individually tailored according to the level of threat posed by the particular individual
- (4) The degree of judicial involvement provided for in the Bill in relation to derogating control orders goes some of the way to meeting the important concern about the lack of judicial involvement in the making of control orders.<sup>636</sup>

Even though positives were identified by the committee, a number of concerns remained. Four core concerns were raised compounded with a final generic concern entitled miscellaneous. Aside from ‘miscellaneous’,<sup>637</sup> the concerns raised questioned;

- (1) The necessity for “derogating control orders”<sup>638</sup>
- (2) The lack of prior judicial involvement in orders depriving of liberty<sup>639</sup>

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<sup>635</sup> Para 2, JCHR 9<sup>th</sup> Report, 2004-2005.

<sup>636</sup> Para 3, JCHR 9<sup>th</sup> Report, 2004-2005.

<sup>637</sup> Para 18, JCHR 9<sup>th</sup> Report, 2004-2005.

<sup>638</sup> Para 5, JCHR 9<sup>th</sup> Report, 2004-2005.

(3) The use of a special advocate procedure in deprivation of liberty cases<sup>640</sup>

(4) The limited judicial control of non-derogating control orders<sup>641</sup>

As this particular paper was the preliminary paper it offered limited insight and examination into these concerns. Boundaries between these concerns became blurred making isolated assessment of each individual concern much harder to perform. The assessment presented in the 9<sup>th</sup> report was less substantive than those carried out on the ATCSA 2001 although a brief review of the tenth report from the session of 2004-2005 has marginally enhanced the Committee's findings.

The tenth Report of Session 2004-2005 was also limited in analysis and content. In the introduction it was explicitly stated that:

'We regret that the rapid progress of the Bill through Parliament has made it impossible for us to scrutinise the Bill comprehensively for human rights compatibility in time to inform debate in Parliament'.<sup>642</sup>

The tenth review explicitly identified that it would be confined to a consideration of the human rights compatibility of the 'three most significant Government amendments to the Bill tabled to the Lords'.<sup>643</sup> The review provided a very brief assessment of:

(1) Adequacy of prior judicial involvement in deprivation of liberty cases<sup>644</sup>

(2) Limited judicial control of non-derogating control orders<sup>645</sup>

(3) Torture evidence<sup>646</sup>

Concerns over the lack of prior judicial involvement in deprivation of liberty cases and the need for prior judicial authorisation of such decisions were deemed fundamental to the rule of law and, therefore, vital to get right. At the point of review, derogating control orders

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<sup>639</sup> Para 10, JCHR 9<sup>th</sup> Report, 2004-2005.

<sup>640</sup> Para 14, JCHR 9<sup>th</sup> Report, 2004-2005.

<sup>641</sup> Para 15, JCHR 9<sup>th</sup> Report, 2004-2005.

<sup>642</sup> Para 1, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>643</sup> Para 1, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>644</sup> Para 2, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>645</sup> Para 11, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>646</sup> Para 18, JCHR 10<sup>th</sup> Report, 2004-2005.



were to be made by the High Court rather than the Secretary of State but only in the order of *ex parte*. This, however, still proved problematic for the JCHR. Concerns arose that the amendments proposed failed to extend to non-derogation orders. The committee further noted concern over whether the procedure contained in the government's amendments secured 'sufficient degree of prior judicial involvement to be compatible with the Convention'.<sup>647</sup> This concern was based on three limitations. Firstly, that the application by the Secretary of State was *ex parte* and, therefore, meant that there would be, 'no adversarial procedure before the making of a derogation control order'.<sup>648</sup> Secondly, the Committee noted concern grounded in the low level threshold for the making of a judicial order which would deprive the individual of liberty. The Committee felt that the test applied would effectively be whether there was a '*prima facie*' case for the making of an order'.<sup>649</sup> Finally, the Committee were concerned that the procedure at the 'subsequent *inter partes* hearing' would include closed sessions during which the interests of the subject of the order would be represented by a special advocate.<sup>650</sup> The Committee remained unconvinced by the argument presented by the Home Secretary about a gap in the law and, therefore, raised concerns of compatibility with the convention's requirements that deprivations of liberty 'must be lawful'.<sup>651</sup>

Further concerns over limited judicial control of non-derogating control orders were raised in both the ninth and tenth report from the JCHR. It was raised that the 'court's function on appeal against the making of a non-derogating control order would not be sufficient to satisfy the right of access to Court in Article 6'.<sup>652</sup> It also implied further convention obligations concerning the restrictions to supervisory jurisdiction.<sup>653</sup> Even though the government presented two defences to the provisions the Committee maintained that, in their view:

'The unprecedented scope of the powers contained in the Bill, and the potentially drastic interference with Convention rights which they (the Government)

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<sup>647</sup> Para 4, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>648</sup> Para 5, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>649</sup> Para 6, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>650</sup> Para 7, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>651</sup> Para 10, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>652</sup> Para 11, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>653</sup> Para 11, JCHR 10<sup>th</sup> Report, 2004-2005.

contemplate, warrant a greater degree of judicial control than access to an ex post supervisory jurisdiction'.<sup>654</sup>

Aside from this, the Committee also made it explicitly clear that non-derogating control orders would be capable of imposing restrictions which fall short of deprivations of liberty but which, regardless of this, would still be capable of restriction of liberty and, as such, should still be subject to prior judicial authorisation.<sup>655</sup>

The final focus for the Committee looked at the use of evidence obtained from torture. The Committee raised particular concern over the lack of omission for responsibility for identifying whether the evidence had been obtained under torture. With this limited scope for 'proving a negative', the Committee confirmed that they remained 'concerned about the possible use of torture evidence by UK authorities', recommending that the government 'implement the UNCAT recommendation that it give some formal effect to its expressed intention not to rely on or present in any proceedings evidence which it knows or believes to have been obtained by torture'.<sup>656</sup> This particular concern raised by the JCHR received relatively little exposure within parliament.

It was clear that the emphasis of the Committee's findings focused on the need for greater judicial control. The Committee found the claims that the Home Secretary and the Prime Minister were best placed to make decisions on control orders to be unsubstantiated. The government grounded its argument for the proposition of lesser judicial control on the basis that it wished not to be accused of failing to do more to protect the public in the event of a terrorist attack succeeding. It was held that this type of comment demonstrated 'precisely the reason why independent safeguards are required'.<sup>657</sup> The Committee further emphasised the need to preserve the role of the independent judiciary particularly as it is fundamental to both the rule of law and the protection of human rights.<sup>658</sup> The remainder of this chapter will now look at specific debates aligned with control orders.

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<sup>654</sup> Para 12, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>655</sup> Para 15, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>656</sup> Para 21, JCHR 10<sup>th</sup> Report, 2004-2005.

<sup>657</sup> As seen from the JCHR 2<sup>nd</sup> Report in 2001, this position was no longer deemed acceptable as a justification for extensive moves.

<sup>658</sup> Para 16/17, JCHR 10<sup>th</sup> Report, 2004-2005.

#### 5.4 The ‘necessity’ of procedural differences in control orders:

As identified by the JCHR reports, a number of concerns were raised over potential incompatibilities within the PTB 2005. Attention focused on the procedural differences in derogating and non-derogating orders. From this, two further concerns emerged as focal points for debate and review within the Houses of Parliament. They were, firstly, the point at which a non-derogating order crossed the threshold and became a derogating order and, secondly, the difference in judicial procedure between the orders, with particular concern over the involvement of the Home Secretary.

The final overview looks at the notion of necessity of the PTB 2005. The inclusion of a sunset clause established to some extent, a perceived need of the Bill. As with the ATCSA 2001, in pressing for a sunset clause, the PTB 2005 became palatable. It met the needs of the Home Secretary while allowing parliament to review the legislation as protected by the sunset clause. This measure may appear as parliamentary procedure succumbing to the claims of the protection of national security; however, it may also be seen as a victory for parliamentary procedure providing for a return to examine the legislation at a later date whilst, in the meantime, protecting security based on the information provided for debate. Nonetheless, the necessity of moves and indeed the proportionality of such moves were called into question. As with the previous discussion on the ATCSA 2001, particular emphasis was placed on the speed of the Bill through parliament and the scrutiny afforded to the Bill in its infancy. As David Davis noted:

‘This question, which runs right through the debate, must be asked: what is the immediate emergency that demands that draconian powers against British subjects should be rushed through the Houses of Parliament without proper consideration, scrutiny or debate? What is the emergency that has arisen in the past 12 months that demands that we give the Home Secretary the right to fetter the liberty of British subjects—from restricting their ability to communicate right up to and including house arrest—without proper debate?’<sup>659</sup>

This position demanded not that the legislation be scrapped, but that there had to be significant proof demonstrated to necessitate such extension of powers.

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<sup>659</sup> HC Vol. 431, Col. 359, D. Davis.

As acknowledged earlier, this examination is not exhaustive. The aim of this review is to provide an indication of the issues raised by parliament. This will start with a review of the executive's position.

#### **5.4.1 Executive Position:**

Two types of control order were presented within the PTB 2005; derogation orders considered necessary in the event of deprivation of liberty under Article 5 ECHR and non-derogating orders which would not require derogation, although it was widely accepted that these may restrict liberty.

Throughout debate the executive maintained that they had:

‘tried to establish a legal framework that balances national security with individual liberty, but it is vital that we convey the message that we want to make this country the most hostile environment in which terrorists could consider operating. That is why we need a series of control orders that are proportionate to the threat that we face and non-discriminatory, in compliance with the European Convention’.<sup>660</sup>

This statement confirmed that the executive were avidly aware that infringement of rights could arise, but that such infringements were acceptable, indicating that it was appropriate to legislate restricting individual rights if security measures required it.

The Home Secretary confirmed that all control orders, irrelevant of type, would impose greater restrictions of individuals' activities and movement. Mr Clarke expressed that there was no doubt that control orders *could* interfere with convention rights such as ‘the right to respect for private and family life—Article 8—freedom of expression—Article 10—and freedom of assembly and association—Article 11’.<sup>661</sup> However, these restrictions were not of concern in this instance as, under the convention, interference with those rights was permissible provided that it was justified by a legitimate aim and was proportionate, a well-established principle.<sup>662</sup> As no deprivation of liberty was invoked, derogation was not

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<sup>660</sup> HC Vol. 431, Col. 1626, B. Hughes.

<sup>661</sup> HC Vol. 431, Col. 692 C. Clarke.

<sup>662</sup> See earlier discussion in Chapter One by Ashworth, A. (2007); Security, Terrorism and the Value of Human Rights.

required.<sup>663</sup> This interpretation was supplemented by Lord Falconer of Thoroton who identified that the drafters of the ECHR recognised that the rights of individuals must always be held in balance with the rights of others. As such, the rights set out in Articles 8 to 11 of the Convention:

‘may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, for a range of purposes, including the protection of the rights and freedoms of others and, in the case of Articles 8, 10 and 11, national security’.<sup>664</sup>

This reinforced the hierarchy of rights, validating the understanding that some rights must give way in times of emergency. This, however, does not avert the vulnerability of rights as a result of this interpretation. In legal terms, the particular rights outlined were ‘qualified rights’ and, as such, were ‘subject to a test of proportionality to determine their legality’.<sup>665</sup> The question this leaves is what is ‘proportional’ within the framework presented? Should it be as explicit as the majority versus the minority or should it simply be infringement of rights as recognised? As previously established, no right is absolute, but proportionality is also a malleable concept thus requiring clearly identifiable parameters to ascertain ‘proportional’ assessment.

Reiterating the distinction between a restriction of liberty and a deprivation of liberty was vital. Charles Clarke announced that a deprivation of liberty was ultimately found in ‘the extent to which a person's physical liberty is curtailed; it must be of a degree and intensity sufficient to justify a conclusion that liberty has been deprived and not merely restricted’.<sup>666</sup> In commenting on the amendments suggested to control orders Hazel Blears expressed:

‘We have accepted the balance of probabilities for derogating orders because deprivation of liberty is a severe sanction. However, we do not accept it for non-derogating orders because there is a distinction between restrictions on liberty and deprivation of liberty’.<sup>667</sup>

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<sup>663</sup> HC Vol. 431, Col. 692, C. Clarke.

<sup>664</sup> HL Vol. 670, Col. 120, Lord Falconer of Thoroton.

<sup>665</sup> Ibid.

<sup>666</sup> HC Vol. 431, Col. 692/693, C. Clarke.

<sup>667</sup> HC Vol. 431, Col. 1797, H. Blears.

This distinction was the crux of the executive's defence. Lord Falconer of Thoroton identified that, 'no combination of restrictions contained in an order made under clause 1 may breach the Article 5 threshold of a deprivation of liberty. If it were to do so, the order containing it would be quashed by the court'.<sup>668</sup> This reaffirmed the importance of the judiciary in maintaining checks and balances, a point acknowledged by the JCHR.<sup>669</sup>

The executive supported these distinctions because they were based on distinctions made by the ECHR itself:

'We draw the line between the two because the ECHR draws the line between the two. Of course it is possible to say that the connection between the lower end of the derogating order and the upper end of the non-derogating order might be close, but in practice there will be a very significant difference'.<sup>670</sup>

The resilience this offered to the justification for the executive's position on control orders allowed the executive to warrant the moves and manifestly enhance their own position with the wider European agenda. Nonetheless the debate over the difference between derogation orders and non-derogation orders and the associated processes was not satisfied by the propositions by the Executive. The on-going debate will now be reviewed.

#### **5.4.2 Non derogation and Derogation – the debate:**

As was seen from the executive discussion, the difference between derogating and non-derogating orders appeared to lie in the interpretation of 'restriction' and 'deprivation'. The executive demonstrated that the difference presented was not one of their doing but in principles laid down in the ECHR.<sup>671</sup> The lack of a clinical formula and guidelines allowed differences between the two orders.

As with the ATCSA 2001 the PTB 2005 faced opposition. Lord Donaldson of Lymington expressed that the 'outstanding feature' was the 'extraordinary difference' between the control orders, a concern which raised a number of subsidiary debates. It was these

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<sup>668</sup> HL Vol. 670, Col. 120, Lord Falconer of Thoroton.

<sup>669</sup> It is, however, alarming that breaches are considered to be remedied retrospectively by the courts. This will be considered at a latter point in this chapter.

<sup>670</sup> HL Vol. 670, Col. 497/498, Lord Falconer of Thoroton.

<sup>671</sup> Ibid.

‘extraordinary differences’ which caused concern. One anomaly identified with the procedure was that derogating orders could last up to six months and were *not* renewable, whereas non-derogation orders could last up to twelve months and *were* available for renewal. Taking a logical approach, Lord Donaldson of Lymington guided the house through the process undertaken for a derogating order:

‘A derogating order must be referred to the court immediately it is made by the Home Secretary and the court is required to start consideration of it within seven days. That consideration is on the merits, it is of vital importance to notice. It is a full appeal. It is not concerned, as is judicial review, with whether the Secretary of State had the power to make the derogating order. Whether or not he was right to do so is another matter altogether, one with which the consideration is concerned.’<sup>672</sup>

Following this, Lord Donaldson of Lymington proceeded to review non-derogating orders:

‘The non-derogating order is not referred to the court. It is left to the person subject to the order to decide whether he wishes to appeal. However, his only right of appeal is to persuade a court that the Home Secretary had no power to make the order, which is a very different matter from being persuaded that he should not have made it. It is said that proportionality redresses the balance, but I do not believe that it does. In this area, a judge would have no idea what was proportionate or not; he simply would not have the information’.<sup>673</sup>

This brief assessment provided by Lord Donaldson of Lymington, encapsulates how the dual process raised concerns not only in who oversaw provisions but in how it was applied, the proportionality of the moves, the arbitrariness of the procedure and the legitimacy of it.

Whilst it was established that a difference between the orders existed, the origins of such distinction still remained. In the opening debate, Mr Marshall-Andrews asked where the distinction between control orders presented in the ‘note on non-derogating control orders’ came from:

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<sup>672</sup> HL Vol. 670, Col. 174, Lord Donaldson of Lymington.

<sup>673</sup> Ibid.

‘It (the note on non-derogating control orders) describes deprivation of liberty as "a technical term" from the outset and at the end draws a distinction between liberty being deprived and liberty being restricted. May I ask the Home Secretary where on earth that distinction can be found in the ECHR, or, indeed, in any other legal authority known in this country?’<sup>674</sup>

The Home Secretary responded with:

‘My point, which I make powerfully, is that it is legitimate under that convention to restrict liberty, provided it is justified by a legitimate aim and provided it is proportionate’.<sup>675</sup>

Probed further following this initial response, and with a weak and uncertain reply, the Home Secretary declared:

‘I do not have the article in front of me. I am advised that it is Article 5, but I would be wary of putting that on the record’.<sup>676</sup>

This lack of certainty undermines the entire executive argument. The Home Secretary failed to recall the executive’s primary defence on the issue central to the entire PTB 2005, bringing into question the validity of the moves. However weak this justification for control orders they were not challenged with the vigour which may have been expected to be seen. Alongside procedural concerns, apprehensions were also raised as to what parameters justified a requirement for derogation or non-derogation orders.

This response by the Home Secretary not only failed to answer the question but further failed to provide substantive evidence to support the executives’ justification for the legislation. The lack of evidence to support the executive position was to be an on-going theme throughout the terrorism provisions. This lack of overarching principles left gaps for scepticism about the Bill. It was later identified that:

‘It is extraordinary that the Home Secretary persists with the artificial distinction between derogating and non-derogating orders. Indeed, many Labour Members

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<sup>674</sup> HC Vol. 431, Col. 693, R. Marshall-Andrews.

<sup>675</sup> HC Vol. 431, Col. 693, C. Clarke.

<sup>676</sup> HC Vol. 431, Col. 695, C. Clarke.



have said that there should no difference in legal process between those two types of order. There is no logical reason for a separate judicial process between derogating and non-derogating orders, and I still hope that the Home Secretary will agree that matter with us'.<sup>677</sup>

This 'artificial' distinction between control orders was no better understood in the House of Lords than with Lord Forsyth of Drumlean describing the lack of clarity as 'as clear as mud'.<sup>678</sup> Lord Falconer of Thoroton, however, maintained that the line was drawn because 'the ECHR draws the line between the two'.<sup>679</sup> Proof of this ECHR distinction failed to come to fruition on several occasions of asking; another matter to deflate the impact of the executive position.

Concerns were also raised over a blurring of boundaries between the two orders. Challenging this risk, Boris Johnson asked what amounted to a restriction of liberty and further what 'combination of restrictions of liberty could amount to a deprivation of liberty?'.<sup>680</sup> The question still remains, however, where a definitive list of combinations might exist and how such combinations would be compiled in the first instance. By asking and requesting examples the focus returned to the Home Secretary to answer directly responding:

'An example of a restriction of liberty might be being forbidden to have a mobile telephone or to contact another named individual, who is known to be a terrorist organiser of some kind. A deprivation of liberty would be a matter of what is colloquially called house arrest or of actual detention. The question of whether a combination of restrictions adds up to deprivation depends on the particular combination'.<sup>681</sup>

Aligning the legitimacy for moves alongside the acceptance that combinations of restrictions may add up to a deprivation, Mr Marshall-Andrews explored the reliability of the ECHR distinction:

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<sup>677</sup> HC Vol. 431, Col. 1775, D. Heath.

<sup>678</sup> HL Vol. 670, Col. 497, Lord Forsyth of Drumlean.

<sup>679</sup> HL Vol. 670, Col. 497/498, Lord Falconer of Thoroton.

<sup>680</sup> HC Vol. 431, Col. 700, B. Johnson.

<sup>681</sup> HC Vol. 431, Col. 700, C. Clarke.

‘He (the Home Secretary) has told the Committee that the ECHR provides a distinction between deprivation and restriction of liberty and that it specifically allows for restriction of liberty, so will he please tell us in which particular article that appears?’<sup>682</sup>

This reiterated frustration and enhanced distrust in the failing by the executive to provide measurable boundaries for moves supported by the ECHR framework. Without clear boundaries, it becomes impossible to delineate where restriction on liberty ends and deprivation of liberty begins. The question became how far a restriction could go? There was genuine concern over what ‘combination or constellation’ of measures set out in non-derogating orders could amount to a derogating order under Article 5 ECHR. It remained the core argument of the executive that derogating orders involved deprivation of liberty whereas non-derogating orders involved restrictions on liberty.<sup>683</sup>

As Charles Clarke informed the House of Commons:

‘What is necessary for deprivation of liberty to take place? It is about the extent to which a person's physical liberty is curtailed; it must be of a degree and intensity sufficient to justify a conclusion that liberty has been deprived and not merely restricted’.<sup>684</sup>

Common throughout debate was a lack of clear and quantifiable answers from the executive. This led to frustration within parliament. Following continued requests for clear guidance on issues, challenges came through a series of hypothetical scenarios to ascertain boundaries. These challenges were articulated predominantly within the House of Lords.

‘In his opening speech he (Lord Falconer) suggested that a curfew order would not be a deprivation of liberty. I find that extraordinary. Surely if someone is to be required to stay in a building, let us say from 7 p.m. to 7 a.m. that must be a deprivation of his liberty’.<sup>685</sup>

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<sup>682</sup> HC Vol. 431, Col. 695 R. Marshall-Andrews.

<sup>683</sup> HL Vol. 670, Col. 218, Baroness Scotland of Asthal.

<sup>684</sup> HC Vol. 431, Col. 692/693, C. Clarke.

<sup>685</sup> HL Vol. 670, Col. 415, Lord Carlisle of Bucklow.

This was countered with Lord Falconer of Thoroton identifying that:

‘It is not a deprivation of his liberty under the jurisprudence of the ECHR. It would be legitimate only as a non-derogating order if it were pursuant and proportionate to a legitimate aim’.<sup>686</sup>

It was identified throughout discussion that the judiciary had a crucial role to play in legitimising control orders. If the executive could not identify where the boundaries between the orders lay, or where reference to parameters were located, then an independent judiciary to review issues was imperative. Assessing the role of the judiciary in deprivation of liberty scenarios, Vera Baird asked:

‘A combination of measures could amount to deprivation of liberty under Article 5. That document refers to control orders, not derogating orders. My right hon. Friend accepts, therefore, that it is possible to take liberty away through a non-derogatory control order. If liberty is taken away under clause 2, he must go to a judge first. He can take liberty away under clause 1 but without going to a judge, except that there would be a right of appeal. In both cases, liberty is taken away, so how can a different procedure be justified?’<sup>687</sup>

Outlining that restriction of liberty could in some instances lead to deprivation of liberty; Vera Baird challenged the need for different processes between control orders and particularly the procedures carried out by the judiciary. This concern emerged from rights and liberties being sacred and that they should not be encroached upon by the executive, a position underpinned by the established theory in Chapter Two. The independence of the judiciary was, therefore, seen as a necessary component in administering good, fair law; a well-established principle. It remained, however, that the executive believed their choice of procedure offered sufficient safeguards. On concerns over the different procedures, Charles Clarke informed the House that:

‘First, a Home Secretary who, on advice, including legal advice, sought improperly—that is the implication of the question—to deprive someone of liberty, whether by an individual derogating control order, or by a combination of non-derogating

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<sup>686</sup> HL Vol. 670, Col. 415, Lord Falconer of Thoroton.

<sup>687</sup> HC Vol. 431, Col. 696, V. Baird.

control orders, would be acting wrongly. Moreover, having acted wrongly, he would be overruled by a judge on appeal and the case would then have to be referred immediately, under the derogating procedure, to the higher level judicial authority set out in the proposal. That is a clear guarantee to meet the sort of concern that my hon. and learned Friend is raising'.<sup>688</sup>

Judicial appeal by way of improper action by the Home Secretary provoked concern about the realistic oversight, and protection, offered by the judiciary. The margin of error which accompanies the possibility that the Home Secretary has acted wrongly could be mitigated if enabled by the earlier intervention of judicial review. To sit and wait for wrong decisions to be made undermines the duty to protect, particularly when a review process could be incorporated to independently review the individual case:

'The distinction that the Home Secretary draws between non-derogating and derogating orders is very difficult in many instances. For example, a person's ability to work could be restricted by orders relating to the use of the internet. Only a judge can determine whether what the Home Secretary calls non-derogating matters are proportionate. Therefore, ultimately, the orders should come before a judge who can decide that question under the terms of the convention and our human rights legislation'.<sup>689</sup>

The Home Secretary maintained from the outset that there was a qualitative difference identified by the ECHR between a deprivation of liberty and a restriction of liberty. Even though concerns were fervently expressed on this, the Home Secretary insisted that case law had confirmed that a difference existed.<sup>690</sup> As Mr Denham noted:

'There is a qualitative difference, but where does that provide the justification for a difference of process? What is going on is this terribly difficult issue of assessing what the intelligence services are telling us, the national risk and the role to be played by an individual. We must either decide that we are to involve the judiciary

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<sup>688</sup> HC Vol. 431, Col. 696, C. Clarke.

<sup>689</sup> HC Vol. 431, Col. 700/701, R. Shepherd.

<sup>690</sup> HC Vol. 431, Col. 698, C. Clarke.

at the outset, or that we are not. Having decided that we are, we must do that across the piece’.<sup>691</sup>

What this observation by Mr Denham signifies is that, whilst it can be established that a qualitative difference exists, there is no clear rationale or evidence to warrant a difference in the process or the standard of judicial involvement. Judicial review has been a fundamental part of the constitutional framework for centuries. As such, unless the standards are essentially required to be different, then the necessity for the process not to exist should be removed.

Having briefly reviewed the difference in procedure between control orders, there appear a number of inseparable issues between decision-making powers, the role of the Home Secretary, and the judiciary. From the debate examined it remained apparent that clear distinction between deprivation and restriction of liberty was weak and unformatted. This was further clouded by the blurred boundaries and legalities of decision-making powers between the judiciary and the Home Secretary.

### **5.5 Decision-Making Powers – The Home Secretary and the Judiciary:**

*‘It cannot be right that a citizen of this country should be put under house arrest by the diktat of a member of the executive, rather than by the courts’.*<sup>692</sup>

As identified earlier, it would be negligent not to consider the division of powers discussed throughout debate over the procedural differences and respective decision-making powers extended to the Home Secretary and the judiciary. After ascertaining the framework of these roles, two further issues will be considered; firstly, the importance of independence and secondly, accountability of actions. Due to the interwoven nature of this debate, it is likely that a number of the issues may become blurred as they are not able to be neatly filed into clear areas for review.

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<sup>691</sup> HC Vol. 431, Col. 698, J. Denham.

<sup>692</sup> HC Vol. 431, Col. 775, D. Heath.

### 5.5.1 Position of the Executive:

Extension of powers to the Home Secretary to restrict and deprive an individual of their liberty raised concern in the House of Commons but gained particular momentum in the House of Lords.<sup>693</sup> With such far reaching powers it was vital for the executive to identify why they were required. The Home Secretary identified:

‘I accept that he and his colleagues have argued throughout that a judge, not a Minister such as the Home Secretary, should take these decisions in various areas. The reason why, ultimately, I do not agree is that the principle of Ministers' accountability to the House and Parliament is important, particularly in cases of national security, where the Government are charged with the responsibility of addressing those questions’.<sup>694</sup>

The executive's primary defence for extension of power to the Home Secretary was grounded on a security agenda – a position well established in security theory.<sup>695</sup> The judiciary, after all, were not completely removed from the process of control orders. The question then became where in the process the trigger existed to induce judicial involvement in control orders and the role they fulfil.

‘The difficulty with control orders, which everyone has eloquently identified, is this: the decision about security is normally a decision that would be made by the executive—in practice, the Home Secretary. But, plainly, you cannot just leave it to the Home Secretary. There must be some judicial oversight to protect the citizen in relation to it and that judicial oversight must be as fair as it possibly can be to the citizen’.<sup>696</sup>

This statement by Lord Falconer of Thoroton identified that despite the fact that security concerns were routinely undertaken by the executive, there *must* be judicial oversight, judicial oversight as Lord Falconer of Thoroton presents however, could be the process of review offered after a non-derogating order has been made, whereas in the process of

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<sup>693</sup> HL Vol. 670, Col. 165, Lord Brennan.

<sup>694</sup> HC Vol. 431, Col. 160, C. Clarke.

<sup>695</sup> See Chapter Two for further debate, MacFarlane, Hoffman, Ashworth etc.

<sup>696</sup> HL Vol. 670, Col. 401/402, Lord Falconer of Thoroton.

derogating order the judiciary is involved from the outset of the order being made. Therefore, even though there is judicial oversight in non-derogating orders, the point at which involvement is invoked may in fact be too late to gain optimum protection for the individual.

### **5.5.2 The role of Judicial Review:**

As identified from this review of the executive's position, there was no doubt that judicial review took place in both derogating and non-derogating orders. The existence of judicial review however was less the concern and more focused on where, in the process of non-derogation orders, the role of the judiciary should be incorporated:

“We acknowledge that the Government have moved some way in terms of strengthening judicial review, but the difference between us remains that the Home Secretary still considers that the judge should review his decisions, while we believe that it should be judges who take the decisions, not politicians. If he is prepared to let a judge overrule his decision, I do not understand why he is not prepared to let a judge take that decision in the first place. Does the Home Secretary realise that if he were to apply to judges for the control orders he would, in our judgment, still be meeting his responsibilities as Home Secretary in terms of dealing with national security?”<sup>697</sup>

As outlined by Mark Oaten, the fact that the judiciary may overrule the findings of the Home Secretary undermines the executive's claim that they need to be in control of issuing such orders. If the ability to overrule is available then why is the safeguard not embedded from the outset? This is a point that was noted particularly in the House of Lords by Lord Forsyth of Drumlean.<sup>698</sup>

After debate, the point of contention remained at which juncture judicial review *should* be activated in a non-derogating order. From the debate it is clear that the executive believe that judicial involvement should be invoked following a Home Secretary decision contrary to the position presented by the Liberal Democrat benches who maintained that judicial intervention should be from the outset. Mark Oaten maintained that judicial involvement

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<sup>697</sup> HC Vol. 431, Col. 159, M. Oaten.

<sup>698</sup> HL Vol. 670, Col. 860, Lord Forsyth of Drumlean.

was an important principle because in its current format ‘a politician is being given the ability to restrict the liberties enjoyed in this country solely on the balance of probabilities’. In consolidating his argument regarding the powers extended to the executive under this Bill, Mark Oaten confirmed that such extension of powers ‘represents a break with years of our history and the Liberal Democrats are extremely uncomfortable with it’.<sup>699</sup> This confirmed the importance of constitutional principles in protecting the individual. So why was there a need for judicial review prior to the decision? Two fundamental attributes have been identified as rationale for the need of judicial review; firstly, independence and secondly, accountability.

### **5.5.3: Independence:**

The separation of powers and the independence of decision-making represented a significant percentage of discussion points received on the PTB 2005. Constitutional principles appeared at the heart of speeches and framed much of the debate on rationale of moves presented by the executive. Mr Griffiths commented:

‘As the Bill stands, the Secretary of State will be the prosecutor, judge and jury in the first instance for both types of order’.<sup>700</sup>

Powerfully reiterating concerns in the composition of the Bill, the emphasis on ‘prosecutor, judge and jury’ explicitly condemned the acquisition of powers the government were claiming for themselves – advances such as these are a constant reminder of the necessity and maintenance of constitutional principles.

Even though apprehensive with the use of control orders, parliament acknowledged their necessity. The composition of them, however, evidently had room for manoeuvre.

‘We accept, as we have always said, that control orders are necessary at least for the time being and that we will assist as we can in achieving a control order system that is fair and just and effective. But it is surely a constitutional issue of the utmost importance that decisions which are restrictive of the liberty of the individual should be taken by the judiciary on the application of the Home Secretary and not

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<sup>699</sup> HC Vol. 431, Col. 370, M. Oaten.

<sup>700</sup> HC Vol. 431, Col. 676, A. Griffiths.



by the Home Secretary. To allow executive decisions to lead to infringements of liberty is the beginning of a downward path which leads where we dare not think'.<sup>701</sup>

If these moves were necessary, then what could be done to make these effective, functional, legal and in line with historic values and traditions?

'The balance between the roles of the judiciary and of the executive is not trivial. The traditional checks and balances on the executive have stemmed from the independence of the judiciary to make the primary decision'.<sup>702</sup>

This vague response by the Home Secretary, alluded to previous statements of support. Failing to mitigate concerns, the Home Secretary acknowledged that a balance between the judiciary and executive was necessary and particularly at the higher level of deprivation of liberty as he had noted in his statement on the 26<sup>th</sup> January 2005, he also believed that the current process provided judicial confirmation,<sup>703</sup> clearly differentiating between 'higher levels of deprivation'. This demonstrated that, even though rights were protected under the ECHR, a 'hierarchy of rights' was applied making the protection of some rights redundant.

The independence provided by the judiciary is necessary and is based on two key factors according to Lord Donaldson of Lynton. First of all, as the judiciary are independent of ministers they can offer alternative interpretations. They are not assumed to be influenced by the political agenda in ways which may burden a politician, such as influences which may force politicians to protect national security thus avoiding accusations of failing to deal with the problem. Pressures such as these are not faced by the judiciary in the same way as the judiciary do not have executive 'responsibility'. Secondly, because of this independence, the judiciary represents a process independent from the government, as demonstrated within the procedure of separation of powers and the maintenance of the rule of law.<sup>704</sup> This reliance on the independence of the judiciary prevents elective dictatorships emerging and guarantees protections to the individual in the knowledge that their case has been independently reviewed and judged. The use of the independent judiciary also averts the

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<sup>701</sup> HL Vol. 670, Col. 1021/1022, Lord Goodhart.

<sup>702</sup> HC Vol. 431, Col 165, T. Lloyd.

<sup>703</sup> HL Vol. 431, Col. 165, C. Clarke.

<sup>704</sup> HC Vol. 670, Col. 178, Lord Donaldson of Lynton.

possibility of 'group think, arising among a small group who have access to secret information'.<sup>705</sup>

The value of judicial independence was also reiterated when examining the context of trust placed on the executive as Lord Plant of Highfield expressed, the whole Iraq debacle still hung heavy over the executive. Lord Plant of Highfield expressed that following the WMD fiasco there were major problems about trust in the state of intelligence and its interpretation.<sup>706</sup> Therefore, to prevent this, the role of the judge would provide an independent review of evidence to ensure its veracity. Reiterating the opinions stated earlier, independent review could prevent misrepresentation of information, swaying the balance of power and control into the hands of the executive, something which the 'WMD fiasco' demonstrated.

Independence, however, was not a standalone issue. Supplementing the foundations of independence lay in the provision of accountability within the state.

#### **5.5.4: Accountability - the role of parliament:**

Interpretation of duties, elected rights and prerogatives provided for on-going debate about the weight afforded to historical, legal and political provisions associated with accountability to the electorate. Although the executive maintained they had accountability to the public, parliament maintained that they too had a duty to protect the public:

'The Home Secretary's reason for refusing to countenance prior judicial authorisation of the deprivation of liberty is that that would be to abdicate to the judiciary the Executive's responsibility for national security, for which it is rightly accountable to Parliament, was an eccentric interpretation of the constitutional doctrine of the separation of powers'.<sup>707</sup>

Accountability of the executive to parliament also emerged:

'In considering how to deal with this difficult problem, does the Home Secretary recognise that it has never been the basis of the rule of law in this country that the

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<sup>705</sup> HL Vol. 670, Col. 144/145, Lord Plant of Highfield.

<sup>706</sup> Ibid.

<sup>707</sup> HC Vol. 431, Col. 392, R. Shepherd.

executive decide and are accountable to Parliament for which individuals are locked up on the ground of criminality?<sup>708</sup>

It is left to ask, however, what the value of this challenge was. The lack of direction and the open-ended nature of this claim allowed the Home Secretary to provide a subjective and non-prescriptive response. Further, this particular question reiterates the need for independence and accountability underlined by the fact there are deeply ingrained constitutional principles to direct this. Nonetheless, the acceptance of 'principle' is long established and should be recognised accordingly; however, it does not permit a government from developing processes in line with the needs of a nation. As the Home Secretary identified:

'I accept that there is a legitimate difference of opinion, which we have discussed before, about the relative roles of the judge and the Government Minister or the Home Secretary. That is not an unreasonable, wrong or ignoble difference, and we can debate it in Parliament just as it has been debated outside Parliament. The reason for my decision and my proposal is that the Home Secretary's Executive responsibility for the security of the country is a paramount issue and should be dealt with in that way'.<sup>709</sup>

Emphasis relied on the paramount notion of national security in determining legislation. This position, presented by the Home Secretary, does lack clarity as to *why* the security of the country might be put further at risk if the judiciary were to be involved.<sup>710</sup> A point the Home Secretary was later challenged on:

'He reminded us that the purpose of the legislation was to try to ensure, so far as we can, the protection of the people of the United Kingdom. How will they be better protected if he pronounces the order in cases of non-derogating orders, instead of a judge doing so?'<sup>711</sup>

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<sup>708</sup> HC Vol. 431, Col. 163, A. Beith.

<sup>709</sup> HC Vol. 431, Col. 163, C. Clarke.

<sup>710</sup> As already noted, the lack of a substantive answer from the Executive is a continuing theme throughout the analysis on the PTB 2005.

<sup>711</sup> HC Vol. 431, Col. 698, M. Campbell.

To which the Home Secretary responded:

‘By definition, someone from the executive would have access to all the information in a way that a judge would not. However, I also accept the argument that, in the case of deprivation of liberty, the penalty is so great that judicial involvement is required’.<sup>712</sup>

The balance presented here returns to similar arguments undertaken on security, intelligence and access to information raised in the debate on the ATCSA 2001. What this demonstrated is that over the duration of four years little, if any, progress had been made in the practicalities of the relationship and information sharing, not only between the executive and the judiciary but also between the executive and parliament. It remained part of a feature which questioned whether competing functions exist between politicians and the judiciary.

#### **Concluding remarks:**

On arrival for Royal Assent it was established that the government had made a number of concessions to enhance judicial involvement in control orders. Nonetheless, it is evident from the examination of the PTB 2005 that emphasis focused on the procedural aspects of the moves rather than the potential inconsistencies with the European agenda. Considerable emphasis was placed throughout debate on the balance between the Home Secretary making decisions on control orders as opposed to the judiciary. As David Davis informed the house:

‘There are good reasons why the Home Secretary should not take such decisions. Imagine the pressures on any politician and on the Home Secretary in particular, after a terrorist outrage. Imagine the temptation to be better safe than sorry and to put away everybody, which are precisely the circumstances in which a miscarriage of justice will occur’.<sup>713</sup>

This position does not detract from the main theme of this examination on control orders. The emphasis on procedure and the discussion on derogation are intrinsically linked. By

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<sup>712</sup> HC Vol. 431, Col. 698, C. Clarke.

<sup>713</sup> HC Vol. 431, Col. 359, D. Davis.

probing the procedure presented by the government, challenges were indirectly made to the conditions upon which the derogation framework is based.

There was also awareness over the direction in which anti-terrorism legislation was moving in this modern age and that 'It is a fact that we are giving greater priority to human rights and civil liberties in these procedures than in any previous type of such legislation'.<sup>714</sup> Aside from this it was recognised that:

'for the past 20 or 30 years, none of us has been happy with the way we have legislated on terrorism. The measure we are discussing today is not as bad as some aspects of the old PTA and it is certainly not as bad as the internment Acts'.<sup>715</sup>

Observations such as these were further supplemented by the change in threat which has demanded such measures.

'A major change has taken place in the security context since then? At the time of the PTA, we did not have suicide bombers or bioterrorists, for example. The nature of the threat that our citizens face is now much greater'.<sup>716</sup>

There is no doubt that a number of MPs maintained that the distinctions between the processes, inclusive of measures to bring the procedures in line with one another, were unacceptable. Aside from the different burden of proof—reasonable suspicion in the case of non-derogating orders and balance of probability in the case of derogating orders concerns remained most notably over the difference in judicial review. Whilst a judge would be brought in at the very beginning in the case of a derogating order, a judge dealing with non-derogating orders will never reach the point of deciding at first instance whether the orders are correct and whether the proposed measures are reasonable. It was this lack of review power and the influence of the Home Secretary that caused considerable concern.

'All that a judge can do at judicial review is deciding whether the Home Secretary has behaved, at first instance, in a reasonable way—reasonable in terms of both process and decision following examination of the facts. The process will involve second-guessing the Home Secretary's decision all the time. That is the

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<sup>714</sup> HC Vol. 431, Col. 1594, C. Clarke.

<sup>715</sup> HC Vol. 431, Col. 1574, C. Soley.

<sup>716</sup> HC Vol. 431, Col. 1606, D. Anderson.

fundamental difference between the ways in which the two kinds of order, and the judicial roles, will operate. The existence of two processes involving orders that are very similar, and in some instances different only in terms of degree, is a recipe for potential disaster'.<sup>717</sup>

This observation by Mr Betts raised a number of 'what if' questions which could be seen to play devil's advocate with the involvement of judges. Questions included: What if the Home Secretary says that he believes, in a certain case, that the balance of measures under clause 1(3) makes a derogating order necessary? What if that is subjected to due process and reaches the judges and the judges decide that the balance of measures is wrong? What if they decide that fewer restrictions are appropriate in that specific case? What if the smaller number of measures then becomes the subject of a non-derogating rather than a derogating order? The court will not be able to deal with a non-derogating order. Fundamentally for Mr Betts, all that the court could do was decide on judicial review whether the Home Secretary was right to impose a non-derogating order.<sup>718</sup> Each of these questions underpins the concerns over the impact of control orders.

There was no doubt that discussion on the difference in procedure was identified as a fundamental role in parliament and a duty to stand up for what they believed to be an important constitutional issue. The ability to have impact and influence over the decisions of the liberal frame work was further evidenced when it was explicitly acknowledged that 'at the other end of this Place we have a House where a party that received 40 per cent of the vote at the last general election has 60 per cent of the seats'.<sup>719</sup> This apparent observation reiterating the continued belief that impartiality on deciding the way forward with issues affecting justice should be undertaken by the principles of liberal democracy.

Outside of acknowledging *Re A*<sup>720</sup> as the trigger for the PTB 2005, there was surprisingly little reference to it throughout the discussion on the PTB 2005. The decision in this case demonstrated the important role that the judiciary can play in legitimising legislation. It is

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<sup>717</sup> HC Vol. 431, Col. 732, C. Betts.

<sup>718</sup> Ibid.

<sup>719</sup> HL Vol. 670, Col. 1021/1022, Lord Goodhart.

<sup>720</sup> [2004] UKHL 56.

questionable whether, if judicial review and advice had been undertaken and listened to in the creation stages of the ATCSA 2001, such case as *Re A*<sup>721</sup> would have arisen.

The PTB 2005 was in a state of complete chaos throughout debate which made interpretations particularly difficult to understand and follow. The lack of structure in the debate may have been associated with the speed of the PTB 2005 through parliament.

The final case study to be reviewed is the TB 2005. Although this arrived at parliament following the events of 7/7, it had already been established by the Prime Minister that such legislation was on the agenda. The events of 7/7 simply provided a context within which to the legislation.

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<sup>721</sup> [2004] UKHL 56.

# Chapter Six:

## TA 2006: 90 days Pre-charge detention:

**13<sup>th</sup> October 2005** – 1<sup>st</sup> Reading of TB

**26<sup>th</sup> October 2005** – 2<sup>nd</sup> Reading of TB

**02/03 November 2005** – Consideration in committee of TB

**09<sup>th</sup> November 2005** – Report stage on TB

**10<sup>th</sup> November 2005** – Third Reading of TB

**15<sup>th</sup> / 16<sup>th</sup> February 2006** – Consideration of Lords' Amendments

**30<sup>th</sup> March 2006** – Royal Assent

The following chapter will review discussion raised on the Terrorism Bill 2005 (TB).<sup>722</sup> A brief background will be presented providing a backdrop to debate including a brief overview of the Bill's origins. A summary of key themes of debate outside of 90 day pre-charge detention will also be presented. The aim of this is to demonstrate intrinsic issues which stem from the quantitative analysis but fail to come to fruition within the case study. As with the previous case studies, to omit such consideration could weaken later analysis.

Following this, discussion will focus on the designated case study. The findings of the JCHR will be presented as a source of review separate to the main debate.<sup>723</sup> The case study in this chapter will focus on the examination of issues raised in conjunction with the original wording of clause 23 proposing 90 day pre-charge detention. This examination will also consider the House of Lords' mooting of the amendment from 28 days to 60 days pre-

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<sup>722</sup> It is important to note that due to the duration of this Bill through parliament it was the TB 2005 which then became the TA 2006.

<sup>723</sup> Whilst the JCHR is a parliamentary committee, the decisions, findings and deliberation are separate to the everyday parliamentary routine and therefore will be reviewed in isolation unless referenced within parliamentary debate.



charge detention.<sup>724</sup> As with the previous chapter, this discussion is thematic not chronological to aid the flow of analysis and prevent repetition of content.

### **6.1 Background to the Terrorism Bill 2005:**

In 2001 it was legislated in the ATCSA 2001 that there would be indefinite detention without trial for non-nationals who could not be removed from the UK for fear of breaching Article 3 ECHR. Following the decision in *A v Secretary of State (Re A)*,<sup>725</sup> the executive drafted the PTB 2005 presenting control orders. Derogating and non-derogating control orders were applicable to any terror suspect irrespective of nationality. Both acts aroused concern; however, it was not until the TB 2005 that significant revolt in order of change was evident.

Shortly after the introduction of the PTA 2005, where scepticism over the 'threat' faced by the UK was raised, London succumbed to a terrorist attack. The series of coordinated attacks targeting the public transport system claimed the lives of 52 individuals with over 700 injured. These attacks were followed two weeks later by attempted attacks which were however apprehended following police investigations. These incidents confirmed executive claims that, at least in the middle of 2005, the UK faced a real threat.

### **6.2: Key themes to emerge out of Terrorism Bill debate:**

On its introduction to parliament, the TB 2005 proposed a number of unsatisfactory measures. Whilst much of the Bill was accepted with minimal discussion, substantial debate was undertaken on clause 1-3, including the glorification and encouragement of terrorism,<sup>726</sup> and clause 23 which presented pre-charge detention for 90 days. Unlike the previous two Acts discussed little, if any, concern was raised over the speed through parliament.

Debate on the TB 2005 appeared clearer in structure than observed from the previous Acts. This clearer, and evidently more methodical review of the legislation, may have been the

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<sup>724</sup> This is because the House of Lords received the amended Bill where clause 23 stipulated a 28 day pre-charge detention period instead of the original 90 days.

<sup>725</sup> [2004] UKHL 56.

<sup>726</sup> Clause 1-3 made it a criminal offence to encourage terrorism by directly or indirectly inciting or encouraging others to commit acts of terrorism. This included an offence of "glorification" of terror – people who "praise or celebrate" terrorism in a way that may encourage others to commit a terrorist act. In the initial stages of debate, focus lay primarily on the extension of power to the Home Secretary and the width of the definitions, particularly with the definition of terrorism as contained within the TA 2000.

result of the longer review period allowing for inconsistencies and concerns to be addressed within a timely manner.<sup>727</sup>

A visit will now be paid to five themes to emerge as influential in the debate on 90 day pre-charge detention. The first of these considers the influence of 7/7 and the claims of associated threat. The second overview looks at the emerging debate over the 'concept' of performing a balance based on rights and security. This was the first time that such a clear review of balance had been discussed within the parliamentary debate examined. This may reinforce the growing awareness of the impact of controlling terrorism within a liberal democracy and the necessity to preserve the notion of justice. The third encompasses the notion of risk whilst the fourth acknowledges that individual rights were considered not necessarily superior to collective rights. The final theme acknowledges the concern that security is not inevitably enhanced with the constriction on liberties.

#### **6.2.1: 7/7 and the threat to the UK:**

The realism of the threat to the UK had been contentious since 9/11. Post 9/11 references were made to a 'new and continued' threat, however, without a direct attack on the UK, for some the threat was no greater than that experienced with Northern Ireland. It was clearly established, however, that many MPs felt, though failed to prove, that a significant difference existed between the acts of the Irish and international terrorism as witnessed post 9/11. 'The terrorist threat that we face now is significantly different from the Irish threat in many ways'.<sup>728</sup> This 'difference' to Irish terrorism had been referenced in both the ATCSA 2001,<sup>729</sup> and the PTA 2005.<sup>730</sup> To an extent, and on one level, the threat was different as for example, whilst it was suggested that the political focus of Irish terrorism often provided warnings of targets, the current emphasis on the willingness and desire to commit suicide differing significantly from anything the UK had dealt with before created a different situation. The gravity and nature of these acts, compounded with the complexities and differences to current dangers, necessitated a complex and different response from counter terrorism measures. Terrorists of the past wished to escape to perpetrate further acts, the

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<sup>727</sup> This however is not quantifiable.

<sup>728</sup> HC Vol. 438, Col. 411, H. Blears.

<sup>729</sup> HC Vol. 372, Col. 622, J. Straw.

<sup>730</sup> HC Vol. 431, Col. 333: C. Clarke; HC Vol. 431, Col. 1606, D. Anderson.

emphasis on suicide in 21<sup>st</sup> century terrorist tactics identified investigation and the handling of potential terrorists as being different.<sup>731</sup> The wider threat posed on society was supported by the list of terrorist atrocities around the world including ‘New York, Nairobi, Sharm el-Sheikh, Bali—tragically twice—Madrid and even in the period since the introduction of the ATCSA had been attacks in Amman and Karachi’.<sup>732</sup> This list of atrocities allowed the executive to use threat rhetoric generating the belief that the measures within the TB 2005 were a legitimate response to the threat.

Although international terrorism was discussed and numerous incidents cited, it was the London bombings which confirmed beyond doubt that the UK was a target; at least at that moment in time. The bombings confirmed the ‘grave challenge’ which, despite a prolonged experience of IRA terrorism, presented significantly new features. The threat could no longer be thought to be invented or exaggerated by the authorities or the media.<sup>733</sup> This threat was not only destructive in intent, but the reliance on suicide presented new challenges to the security services and the police in detection and prevention. This influenced assessments on risk and stabilised the necessity of a pre-emptive response.<sup>734</sup> Terrorism for some now was the single biggest threat to security in the UK and the hideous atrocity that took place on 7 July 2005 confirmed this.<sup>735</sup>

7/7 triggered a consciousness about the implications of failing to react to a threat. Lord Desai acknowledged that the position taken on the contents of the TB 2005 had been ‘disturbed or enhanced’ by the events of 7/7, commenting further ‘perhaps I should not let such events influence me, but I do’.<sup>736</sup> This consciousness of the implications also invigorated awareness of the rights not only of the suspect but of all individuals. This drove the legislative framework back towards the notion of collective security and measures perceived necessary to protect the wider public.

The events of 7/7 justified the executive in reviewing the ‘adequacy of legal measures’ within the anti-terror repertoire. The fact that attacks had taken place was:

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<sup>731</sup> HL Vol. 675, Col. 1478/1478, Lord Harris of Haringey; HL Vol. 676, Col. 1160, Baroness Ramsay of Cartvale.

<sup>732</sup> HL Vol. 675, Col. 1384, Baroness Scotland of Asthal; HC Vol. 438, Col. 323 C. Clarke.

<sup>733</sup> HL Vol. 675, Col. 1469, Lord Ahmed.

<sup>734</sup> HL Vol. 675, Col. 1396, Lord Bishop of Southwark.

<sup>735</sup> HL Vol. 675, Col. 1388/1389, Lord Kingsland.

<sup>736</sup> HL Vol. 675, Col. 1447, Lord Desai.

‘Highly relevant evidence in an assessment of the level of terrorist threat, which itself is relevant to the proportionality of any interference with rights that can be restricted in the interests of public safety and security’.<sup>737</sup>

Previous claims of risk to the UK were qualified and as noted by Freedman, with indiscriminate killing and no strategy, the level of terror presented by the acts of 7/7 led to vulgar risk assessment. Whilst the public may view their own security as the government’s most important responsibility and therefore inadequate action or a failure to take action would be ‘a flagrant dereliction of duty’,<sup>738</sup> it did not go unnoticed that proportionality was key in decision making; ‘all measures taken by states to fight terrorism must themselves respect human rights and the principle of the rule of law’.<sup>739</sup>

Following a number of brief reflections on the threat of terrorism and the events of 7/7, discussion within parliament progressed to discuss the emerging likelihood of balance between security and rights. This balance was not solely assigned to particular clauses within the TB 2005 although emphasis was placed on pre-charge detention. When considering the threat and the consequent need to balance, members from both Houses of Parliament expressed that their role was to ‘prioritise the protection of our people in the face of a new and lethal threat’.<sup>740</sup> It is unsurprising that MPs directly responsible to the public would openly and boldly talk about a ‘new and lethal threat’, particularly in the aftermath of 7/7 however, as established in Chapter Two, the existence of such threat remained unsubstantiated in both the academic community and indeed within the Houses of Parliament. Therefore, the length to which provisions should extend in return for protection against the incalculable threat was integral to the debate on the TB 2005.

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<sup>737</sup> Freedman L. (2005); *The Politics of Warning: Terrorism and Risk Communication*. Pp. 388/390.

<sup>738</sup> HL Vol. 675, Col. 1469, Lord Ahmed.

<sup>739</sup> HC Vol. 438, Col. 390/391, A. Dismore.

<sup>740</sup> HC Vol. 438, Col. 398, S. Malik; HL Vol. 675, Col. 1384, Baroness Scotland of Asthal.

### **6.2.2: The TB 2005 peripheral view on rights & security – the acknowledgement of balance:**

Following the events of 7/7 it was determined early in the gestation of the TB 2005 that moves undertaken by the government were under pressure based on two competing duties; the perceived competition between protection of the lives of citizens through security measures and, the duty to protect individual rights. However viewed, it became evident that any outcome would demand that a balance be struck.<sup>741</sup> Nonetheless, as previously established,<sup>742</sup> with no clear formula to ascertain balance the process could not be clinical. David Davis identified that parliament must:

‘balance between effective laws and fundamental freedoms, between security and freedom and between defending our way of life and defending the values that define it’.<sup>743</sup>

As tough as that balance may be to arrive at, it is a job which parliamentarians must do to keep ‘fundamental freedoms’ and the ‘country safe’.<sup>744</sup> This parliamentary duty was enhanced with a ‘criteria of necessity’ for moves. These criteria ascertained that when examining moves, weight should be ascribed to the likelihood of the moves working, the possibility for alternatives and the ‘proportionality’ of the proposal. This should all be framed within the constraints of a comparable scale with the threat the measures were trying to prevent.<sup>745</sup>

Even though debate acknowledged the rights of the public, focus throughout debate remained primarily on those of the suspect. It was identified early on that the particular debate on pre-charge detention was a balancing exercise between the safety of the public and the fundamental rights of individuals not to be detained for lengthy periods without charge.<sup>746</sup> The problem then became how various risks (to the individuals’ rights or to

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<sup>741</sup> HC Vol. 438, Col. 388, P. Robinson.

<sup>742</sup> Pp. 41-47

<sup>743</sup> HC Vol. 438, Col. 354, D. Davis.

<sup>744</sup> HC Vol. 438, Col. 354, D. Davis.

<sup>745</sup> HL Vol. 675, Col. 1397 Lord Bishop of Southark.

<sup>746</sup> HL Vol. 677, Col. 1218, Baroness Ramsey of Cartvale; HL Vol. 675, Col. 1450, Lord Mackenzie of Framwellgate.

national security) were to be weighed against one another in light of the existing threat and the legal protections afforded to individuals.

### 6.2.3 Risk:

Discussion on the pre-charge detention of individuals for up to 90 days sparked debate on the impact that such a clause would have on individuals. Contrary to this, for the first time in the debates examined, the right of the 'innocent' bystander was raised. Baroness Symons of Vernham Dean identified that the first duty of the legislator was 'to protect the innocent and their fundamental right to life and not to take risks with their safety'.<sup>747</sup> The consequences of taking risks with the lives of innocent citizens was advocated throughout parliament.<sup>748</sup> The events of 7/7 aroused the need for protection of the security of individuals.<sup>749</sup> The harsh reality of 'the man and the young woman who lost lower limbs in the terrorist acts of 7 July in London and will spend the rest of their lives in wheelchairs'<sup>750</sup> shifted the goal posts in how debate for and against the act was presented. Summarising a number of similar views Viscount Brookeborough identified:

'On the evidence that I have heard, and because I do not want to take risks with other people's security, I support the amendment'.<sup>751</sup>

Even though this declaration made by Viscount Brookeborough was for 60 not 90 days pre-charge detention it nonetheless demonstrated a rationale for support in the extension of pre-charge detention periods.

Whilst acknowledged that the risk of unnecessary incarceration was undesirable, for some, the risk to a few was outweighed by the risk to the collective.<sup>752</sup> A balance had to be struck between liberty and life and between loss of liberty and loss of life. The necessity to balance was therefore inevitable. Response to the nature of risk posed post 7/7 led Lord Foulkes of Cumnock to note:

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<sup>747</sup> HL Vol. 677, Col. 1228, Baroness Symons of Vernham Dean; HL Vol. 675, Col. 1461, Baroness Turner of Camden; HL Vol. 675, Col. 1448/1449, Lord Brennan; HL Vol. 675, Col. 1421, Lord Morris of Aberavon; HC Vol. 438, Col. 356, P. Murphy; HL Vol. 675, Col. 1437, Lord Carlile of Berriew.

<sup>748</sup> HC Vol. 431, Col 151, C. Clarke.

<sup>749</sup> HL Vol. 675, Col. 1463, Lord Griffiths of Burry Port.

<sup>750</sup> HL Vol. 676, Col. 1163, Lord Imbert.

<sup>751</sup> HL Vol. 676, Col. 1171, Viscount Brookeborough.

<sup>752</sup> HC Vol. 439, Col. 535, G. Banks.

‘to have one or two people perhaps—perhaps—held in gaol for a few days extra: that loss of liberty. Which is more important? That loss of liberty or the loss of life? I know which side I am on’.<sup>753</sup>

Justifications such as these are particularly crude. If this response was a comparison between the state killing and the state removing liberty then the statement makes sense but if it is between the state removing liberty and the state trying to avert a threat it is different. The threat, risk and infringement are not necessarily proportional and run counter to historic principles of justice.

It is, therefore, necessary to examine the physical ‘risk’ as the events of 7/7 but also the balance of risk to individuals, both the suspect and the public. As identified in Chapter Two, different types of terrorism raise different concerns over risk, warnings and targets. It was the ‘indiscriminate killing’ that forced vulgar risk assessments to be made on the unknowable thus forcing decisions to be made, which at first may seem reactive to the horrors rather than well-established protocol.<sup>754</sup> This understanding of risk identified that individual rights are not necessarily seen to be superior to collective rights.

#### **6.2.4: Individual rights are not seen as superior to collective rights:**

In facilitating the wider justification and framework in the balance process, reference was made to a social contract which is entered into as an ‘everyday currency’ of society whereby:

‘In any society we have to accept that there are some restrictions on our freedoms in those crucial areas where they are necessary for the greater security of innocent civilians. Such restrictions are the everyday currency of what one might call the "social contract" that we all enter into as part of a secure society’.<sup>755</sup>

With this understanding that a ‘social contract’ is entered into, the balance between the greater good of security and the preservation of individual liberty is weighted more in favour of the former. This, however, pulls on the notions identified in the introduction to Section II that confusion remains over the notion of the legally protected right of security. In

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<sup>753</sup> HL Vol. 676, Col. 1191/1192, Lord Foulkes of Cumnock.

<sup>754</sup> Freedman, L. (2005); *The Politics of Warning: Terrorism and Risk Communication*. Pp. 388/390.

<sup>755</sup> HL Vol. 676, Col. 1136, Baroness Symons of Verham Dean.

fact, this may be considered little more than a ‘good’ for which rights should be used. Belief that UK legislation needed to be more robust to satisfy its first duty to protect the safety and security of its people was furthered with the observation that, whilst a prisoner has rights the public also has them.<sup>756</sup> Confirming the existence of consequentialist opinion within parliament, it was suggested that:

‘Is it really such a hardship to spend up to—and only up to—three months in custody, protected from abuse by the whole force of the law, if you have given the authorities reason to believe that you are a possible threat, and a great deal of possible supporting evidence exists that must be examined? We must not, in fighting for the rights of the individual prisoner, forget that the police are doing what society requires of them’.<sup>757</sup>

Despite the fact that society might require the police and other services to protect security, society also requires the police to enhance freedom. Such general statements overshadow the notion that a balance is required in every decision and in every case. Speaking in such clinical terms deflects from the reality, that whether legal or theoretical in the understanding of rights, decisions are rarely so definitive. The contested nature of rights: what they are, who they protect, when they are overridden, when they are absolute, all feed into arrival at a decision where balance or compromise has been considered and hopefully rationalised.

This explicit balance in the rights of the individual compared with collective rights was reaffirmed when it was acknowledged that:

‘I hope we shall think not only of the few who want to destroy innocent lives, but of the many who deserve protection, and who want and expect their democracy and human rights to be protected by this parliament’.<sup>758</sup>

This fails to account for individuals mistakenly accused and triggers the theoretical debate underpinning rights law. It was to be the ‘innocence and diversity’ of 7/7 that drove some for the first time, to ‘instinctively wanting’ security to be placed above liberty. Such ‘abrupt

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<sup>756</sup> HL Vol. 675, Col. 1400, Baroness Symons of Vernham Dean.

<sup>757</sup> HL Vol. 676, Col. 1163, Baroness Park of Monmouth; HC Vol. 438, Col. 354, P. Murphy.

<sup>758</sup> HL Vol. 675, Col. 1400, Baroness Symons of Vernham Dean.



and cruel death' demanded that security be treated with utmost importance.<sup>759</sup> This position is understandable as is the political rhetoric to respond, however, this is exactly the type of situation for which human rights are developed; when rhetoric and the majority want rights to be ignored for their own ends. That is why law protects individual rights. Nonetheless, proclamations such as these by Lord Griffiths of Burry Port reaffirmed the influence of the rights and security debate.

Whilst generic discussion undertaken on the balance between rights and security commanded support for security in light of the London bombings, such events did not derail all speakers from the beliefs which they held on rights and liberties. Many of the arguments in favour of liberties centred less on the incursion that such moves as extended pre-charge-detention would have on individuals, but more so on the power which the executive was appropriating. This position was identified when Mr Gummer presented that;

'Is it not always true that there are two arguments for destroying human rights: one is, "We have never had a situation like that before"; the other is, "We have no intention of making it worse later on"? Both those arguments are very dangerous, and this House should not accept them'.<sup>760</sup>

This was advice against the prospect that the government would hijack the events of 7/7 to create legislation that did not deal with the problem and which would be used to curb freedoms. Nonetheless, it remained important that in the face of terrorism the democratic system should not be 'overwhelmed by revulsion and a desire to act'.<sup>761</sup> This need to protect, however, was not conducive with enhancing security whilst constricting liberty.

#### **6.2.5: Failure of enhancing security with constrictions of liberties:**

As seen earlier, even though a view is pertained that the public will accept restrictions on liberties in return for increased security, scepticism over the damage this will cause in the long term remains within parliament. Concerns were raised that by increasing the possibility of a very small number of prosecutions, the sacrifice of a number of fundamental

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<sup>759</sup> HL Vol. 675, Col. 1463, Lord Griffiths of Burry Port.

<sup>760</sup> HC Vol. 439, Col. 374, B. Gummer.

<sup>761</sup> HL Vol. 675, Col. 1444, Baroness Kennedy of the Shaws.

rights was too big a stake to make.<sup>762</sup> Whilst commentators did not ‘actively’ prioritise rights over security, they did identify the damage that could be caused should parliament not consider the impact of legislation carefully. Using the experience of Northern Ireland Lord Kingsland expressed that:

‘It is important that we do not fall into the trap of assuming that a nation's security is enhanced by the constraint of its citizens' liberties. This lesson was no more vividly learnt than during the period of the Troubles in Northern Ireland when the policy of internment was pursued. It sharpened the differences between the two communities; it exacerbated the problem we faced in the no-go areas and, perhaps, above all, it proved a massive disincentive to Catholics to provide information to our security forces’.<sup>763</sup>

This example does not deter from the threat, the risk, or the need to protect society, however, it warns of the backlash which may emerge should parliament, in legislating, forget the protection of individuals in its bid to protect security. This interpretation still leaves the pertinent question of just how far a Bill can go in ‘destroying’ liberty in an effort to stop terrorist activity.<sup>764</sup> David Davis acknowledged the origins of *habeas corpus* and the need for protection against imprisonment without trial, and established that whilst this tradition existed, a shift in the need for protection of security sometimes requires support for liberties to be qualified – detention without charge may happen. Balance, therefore, becomes a process of rationalising potentially conflicting goods.

‘If the period of imprisonment is too brief, the civil liberties of suspects may be protected, but the lives of innocent people may be endangered. If the period of imprisonment is too long, locking up people without charge risks becoming the first resort of the authorities rather than the last (...) The House knows the serious consequences for our national security and our civil liberties if we get the balance wrong in any direction’.<sup>765</sup>

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<sup>762</sup> HL Vol. 677, Col. 1230, Baroness Kennedy of the Shaws.

<sup>763</sup> HL Vol. 675, Col. 1389/1390, Lord Kingsland.

<sup>764</sup> HL Vol. 675, Col. 1414, Baroness Williams of Crosby.

<sup>765</sup> HC Vol. 439, Col. 346/347, David Davis.

This warning is indicative of much of the debate in the balance between rights and security. It appears that individuals against the moves originally presented within clause 23 avoided overtly supporting rights focusing on the lack of necessity portrayed within the evidence relied upon by the executive.

Each of these themes explored above create a picture amongst which discussion on the TB 2005 was framed. The acknowledgement that constriction on liberties would not necessarily enhance security, the events of 7/7 demonstrated that the UK remained vulnerable to attack. This subsequently led to explicit discussion that a balance may be required between rights and security indicating that, in some cases, it is not perceived that individual rights should take priority over collective needs. Each of these influences fuelled debate over clause 23.

Following this brief overview, findings from the JCHR on the TB 2005 will now be presented. These findings could form a fundamental part of the review process in assessing the compatibility of the legislation presented. However, as has been seen thus far, reliance on the information and resources explored by the JCHR appears limited from either side of the debate.

### **6.3 JCHR:**

The JCHR released its formal report on Counter Terrorism Policy and Human Rights: Terrorism Bill and related matters on the 28<sup>th</sup> November 2005. As with the previous reports from the JCHR, the paper provided a wider framework than required for the purposes of this chapter. The Bill was considered to present potential incompatibilities with human rights standards in that the definition of ‘terrorism’ remained the same.<sup>766</sup> Aside from pre-charge detention, concerns were also raised over clauses discussing deportation and exclusion, encouragement and glorification, training for terrorism and, immigration legislation amongst others.

It was accepted that 7/7 constituted ‘gross violations of human rights’ and the attacks were also a violation of the ‘foundational values of democracy and the rule of law’.<sup>767</sup> It was also recognised that human rights law imposed onerous positive obligations on states to take

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<sup>766</sup> Para 12, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>767</sup> Para 4, JCHR 3<sup>rd</sup> Report, 2005-2006.

steps to protect the 'lives and physical integrity of everyone within their jurisdiction against the threat of a terrorist attack'.<sup>768</sup> The increasing recognition of the rights of victims further pushed states to fulfil such obligations,<sup>769</sup> further accepting the government's argument that threat had heightened as a result of 7/7. The attacks realigned the balance of threat with interference of rights which could be legitimately restricted in the interests of public safety and national security.<sup>770</sup> Whilst a response was necessary, concern remained for the risk of alienating communities, confirming that if the measures were counterproductive, 'the state will be failing to fulfil its positive obligations'.<sup>771</sup>

As mentioned previously, encouragement and glorification of terrorism was heavily assessed within the JCHR findings. It was examined as to whether clause 1 of the TB 2005 would be compatible with Article 10 ECHR. On reviewing the necessity, proportionality and legal certainty of the clause it was concluded that, as drafted on arrival before the committee, the proposed offence of encouraging terrorism was too wide to satisfy the committee.<sup>772</sup> The JCHR also indicated that a subjective test of recklessness should be proved 'as an alternative to intent' to satisfy the need for legal certainty.<sup>773</sup> Further questions were asked regarding the compatibility of the TB 2005 with the Convention on the Prevention of Terrorism. It was signalled by the Committee that clause 1, as drafted, failed to meet the two requirements<sup>774</sup> of the Convention on the Prevention of Terrorism resulting in the failure to 'faithfully' implement Article 5 of the Convention on the Prevention of Terrorism.<sup>775</sup> The JCHR also found that the proposed control over the dissemination of terrorist publications, and the charges which accompanied were

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<sup>768</sup> Para 5, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>769</sup> Para 5, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>770</sup> Para 7, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>771</sup> Para 9, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>772</sup> Para 25, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>773</sup> Para 31, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>774</sup> These requirements were in Article 5(1) of the Convention on the Prevention of Terrorism and require that the scope of such an offence be restricted by two limitations. First, there must be a specific intention to incite the commission of a terrorist offence. And second, the making available of a message to the public must cause a danger that such offences may be committed. Article 12 of the Convention also requires states to respect relevant human rights obligations when creating the offences required by Article 5. Para 40, JCHR 3<sup>rd</sup> Report 2005-2006.

<sup>775</sup> Para 41, JCHR 3<sup>rd</sup> Report, 2005-2006.

incompatible with Article 10 ECHR. The offence was further deemed to lack connection to incitement to violence and the lack of intention clause.<sup>776</sup>

Pre-charge detention appeared to be central to discussion in the paper. In a bid to contextualise the pre-charge detention timeframe, the committee provided a brief review of the evolution on the law on pre-charge detention in terrorist cases. This assessment dated back to the PTA (Temporary Provisions) Act 1984 and included brief acknowledgement of the derogation of Article 5(3). It further acknowledged the impact of the TA 2000 which maintained a detention period of 7 days but which introduced judicial control to enable derogation from Article 5 ECHR. The final Act referred to was the Criminal Justice Act 2003 which, in section 306, extended the maximum period of pre-charge detention from 7 to 14 days subject to 'judicial authorisation'.<sup>777</sup>

The committee guided the report through an extensive review of pre-charge detention. The JCHR acknowledged evolution of the law on pre-charge detention in terrorist cases; the current position of detention under the TA 2000, the effect of the provisions contained within the TB 2005 and the associated human rights implications, including safeguards to the detainee.<sup>778</sup>

The committee found that the TB 2005 introduced three significant changes for pre-charge detention. It increased the period of detention from 14 days to 3 months; it provided that each period of judicially authorised extension must be for seven days unless other special circumstances dictate; and finally that grounds for extension may be extended under clause 24(1) 'pending the result of an examination or analysis'.<sup>779</sup> Following the escalation in changes, the committee identified 3 overlapping aspects of the right to liberty which were engaged by the extension to pre-charge detention through Article 5(1),<sup>780</sup> 5(2)<sup>781</sup> and 5(3)<sup>782</sup> ECHR. In examining the implications of these overlapping aspects of pre-charge detention

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<sup>776</sup> Para 46 & 49, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>777</sup> Para 65 – 68, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>778</sup> Para 65-103, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>779</sup> JCHR 3<sup>rd</sup> report 2005-2006, Para 73.

<sup>780</sup> The requirement in Article 5(1) that deprivation of liberty must be "in accordance with a procedure prescribed by law" and "lawful", which imports a requirement that the detention must be neither arbitrary nor disproportionate.

<sup>781</sup> Article 5(2) ECHR, the right of an arrested person in Article 5(2) ECHR to be informed "promptly" not only of the reasons for his arrest but also "of any charge against him".

<sup>782</sup> The right of a person arrested on reasonable suspicion of having committed an offence to be brought promptly before a judge, under Article 5(3) ECHR.

on the right to liberty the JCHR reviewed the evidence available. Evidence came from the Deputy Assistant Commissioner,<sup>783</sup> NGOs,<sup>784</sup> the Home Office,<sup>785</sup> the Carlile report<sup>786</sup> and the Home Secretary.<sup>787</sup> The police noted that relying on lesser charges might increase the risk of bail being granted. The police saw the control order as a 'useful complement for pre-charge detention, not a substitute' based on the degree of control afforded to a control order.<sup>788</sup> The Carlile report concluded that a maximum of three months was 'probably a practicable and sensible option',<sup>789</sup> whereas NGOs, such as Liberty considered that 'more appropriate and proportionate ways of meeting the police concerns were available'.<sup>790</sup> The committee also received advice from Professor Clive Walker who claimed that 'a proportionate case is not made out', accepting that, whilst there were operational difficulties faced by the police, there was a lack of evidence which had prevented the police from prosecution in any given case.<sup>791</sup>

The committee observed that the government had correctly noted that there was no ECtHR jurisprudence which set a clear limit on the length of time for which a person may be detained pending charge. This was countered by the Committee identifying that there had been cases where the ECtHR had found violations of Article 5 in cases of detention for periods of less than 14 days.<sup>792</sup> The other constraints examined by the Committee also incorporated the right not to be subjected to inhuman and degrading treatment under Article 3 ECHR and the right to a fair hearing Article 6(1) ECHR. Concern was also raised over the reliability of evidence obtained after extensive periods of detention. This could result in evidence being excluded under section 78 of the PACE.<sup>793</sup>

The committee concluded that 90 days would have been disproportionate based on the deficiencies in the procedural safeguards for the detainee and could bring about

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<sup>783</sup> Para 80, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>784</sup> Para 83, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>785</sup> Para 76, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>786</sup> Para 82, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>787</sup> Para 77, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>788</sup> Para 81, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>789</sup> Para 82, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>790</sup> Para 83, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>791</sup> Para 84, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>792</sup> Para 85, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>793</sup> Para 86, JCHR 3<sup>rd</sup> Report, 2005-2006.

‘independent breaches of Article 3 ECHR’.<sup>794</sup> It was accepted that the current 14 day period needed extending but that had to be proportionate to the threat. The legitimate aim was ultimately for parliament and the courts to decide. In the Committee’s view any increase beyond 14 days would require amendments to the relevant provisions within the TA 2000. Further to this the committee stipulated there should be nothing less than a full adversarial hearing before a judge when deciding if detention was necessary.<sup>795</sup>

Having reviewed the wider influences on 90 day pre-charge detention and the observations, findings and recommendations from the JCHR, attention will now turn to the case study of this chapter. 90 day pre-charge detention was identified as an area of significant contention and was ultimately amended to just 28 days.

#### **6.4: Pre – charge detention – the 90 day debate:**

Clause 23 in its initial format raised concerns for MPs.<sup>796</sup> While the events of 7/7 warranted an extension of detention powers for some,<sup>797</sup> others felt that there was no evidence to indicate such extension.<sup>798</sup> Pre-charge detention had witnessed an evolution in recent years and, for some, an extensive catalogue of legislation already existed which could be called upon before requiring an extension to pre-charge detention.<sup>799</sup> The evolution of pre-charge detention in terrorist cases began following The PTA (Temporary Provisions) Act 1984 which provided detention without charge for up to seven days without judicial authorisation.<sup>800</sup> The ECtHR, in the case of *Brogan*,<sup>801</sup> however, found this to violate Article 5(3) ECHR on grounds that individuals have a right to be brought promptly before a judge. In order to keep the seven day pre-charge period, the UK derogated from Article 5(3). This derogation was upheld by the ECtHR in 1993 in the case of *Brannigan and McBride v. UK*<sup>802</sup> as being ‘strictly required by the exigencies of the situation’.<sup>803</sup> The TA 2000 maintained the 7 day pre-charge detention period but introduced judicial control over the period of detention.

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<sup>794</sup> JCHR 3<sup>rd</sup> Report 2005-2006, Para 87.

<sup>795</sup> JCHR 3<sup>rd</sup> Report 2005-2006, Summary Pre-charge detention. Pp. 4.

<sup>796</sup> HC Vol. 438, Col. 359, M. Oaten.

<sup>797</sup> HC Vol. 438, Col. 359, S. Khan.

<sup>798</sup> HC Vol. 438, Col. 364, T. Lloyd.

<sup>799</sup> HC Vol. 438, Col. 895, D. Heathcoat-Amory.

<sup>800</sup> This starting point has been selected bringing the analysis in line with that of the JCHR who also started their analysis from this point.

<sup>801</sup> *Brogan v UK* (1988) 11 EHRR 117.

<sup>802</sup> *Brannigan and McBride v UK* [1994] 17 EHRR 539.

<sup>803</sup> Para 66 ECtHR (14553/89; 14554/89).

This judicial review allowed the UK to withdraw its derogation from Article 5 ECHR. In 2003 the Criminal Justice Act, whilst extending the maximum period of pre-charge detention from 7 to 14 days, maintained the protocol of judicial authorisation.

Significant debate was undertaken on clause 23 pre-charge detention. The difference in this analysis, compared with that of the previous two acts examined, is the alteration of the Bill prior to its review by the second chamber. These changes were necessary in order to ensure some extension to the normal pre-charge detention periods. Therefore, on arrival at the House of Lords, amendments had already been made to reduce pre-charge detention from 90 days to 28. Even in its amended state, discussion on the need for 90 days was mooted and in later debate an amendment was introduced to the House of Lords advocating for a 60 day detention period. This fell in the House of Lords and 28 days remained. Nonetheless, this demonstrates the variation across both houses on the period of pre-charge detention deemed acceptable.

As noted throughout this thesis, the influence of public opinion is a significant factor in policy creation; the TB 2005 was no exception. Sky News commissioned a YouGov poll prior to the vote on clause 23 in an attempt to assess public views on an increased pre-charge detention period. The poll identified 72% support for 90 days with just 22% opposed; however, the use of this data should be approached with the same caution as all data.<sup>804</sup> Even though the public had identified detention without trial as acceptable to protect against terrorism, parliament was less convinced. Nonetheless, with figures such as these at the disposal of the executive, it is unsurprising that the debate and vote on clause 23 of the TB 2005 remained tight.

#### **6.5: Exec position on 90 day:**

The executive's evidence to support clause 23 appeared limited and unsubstantiated, relying heavily on the 'say so' of the police, the security services and the Carlile report.<sup>805</sup> Whilst the Carlile report did not justify 90 days pre-charge detention, it did acknowledge that it might be acceptable. This acceptability was grounded in 'several operations' that

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<sup>804</sup> [http://www.yougov.com/archives/pdf/DBD050101009\\_1.pdf](http://www.yougov.com/archives/pdf/DBD050101009_1.pdf) (Accessed 20.06.07)

<sup>805</sup> Lord Carlile was appointed in 2001 as an independent reviewer of terrorism legislation, a function he performed until 2011. The Findings from his reports were utilised by the JCHR in their 3<sup>rd</sup> Report 2005-206. See Pp. 218.



Lord Carlile of Berriew was personally aware of in which arresting early in order to avoid terrorist attacks had led to problems in the gathering of evidence after arrest to be able to charge at all, or at the appropriate criminal level.<sup>806</sup> This was further supported by his belief 'beyond doubt' that:

'there have been situations in which significant conspiracies to commit terrorist acts have gone unprosecuted as a result of the time limitations placed on the control authorities following arrest'.<sup>807</sup>

On the 26<sup>th</sup> of October 2005, Charles Clarke<sup>808</sup> informed the House of Commons that the executive believed the position for extension of pre-charge detention was justified. Justification laid heavily on the 'compelling case' strongly supported by the police. UK anti-terrorism legislation over the past 30 years had been geared towards dealing with the different problem of the Troubles in Northern Ireland. This challenge had now been replaced by international networks of terrorists.<sup>809</sup> Based on this new threat, prevention became vital, as is consistent with the pre-emptive theories of Zedner et al.<sup>810</sup> As a result of the early apprehension required of terror suspects, greater time to collect evidence after the arrest was requested by the authorities, a position supported by the independent review of Lord Carlile of Berriew.<sup>811</sup> This rationale, however, suggests that prevention of terrorist atrocities works on the proviso that authorities will arrest first, ask questions and establish evidence later. The executive maintained that, based on the information provided to them by the police authorities, it was identified that the international dimension and the complexities of information gathering across different jurisdictions meant enquiries took longer to complete and consequently extended periods of detention were required.<sup>812</sup> Emphasising the problems the international nature of terrorism has on the speed of evidence gathering, Mr Clarke identified concerns with the limited resources available to deal with translation of materials and having interpreters who are able to fulfil the role in

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<sup>806</sup> Report by the independent reviewer Lord Carlile of Berriew Q.C., October 2005 at para. 58

<sup>807</sup> Ibid. Para. 61

<sup>808</sup> Much of the executive position was presented by the Home Secretary of the time Charles Clarke. As such, the verbatim position he purports is taken to be that of the executive.

<sup>809</sup> Identified since the discussion in 2001 that difference existed

<sup>810</sup> See: Zedner, L. (2007); Seeking Security by Eroding Rights: The Side Stepping of Due Process

<sup>811</sup> Report by the independent reviewer Lord Carlile of Berriew Q.C., October 2005 at para. 61

<sup>812</sup> HC Vol. 438, Col. 340, C. Clarke

such cases.<sup>813</sup> With all these considerations ‘I believe that there is now widespread recognition in the House that an increase beyond 14 days is necessary’;<sup>814</sup> a position previously expressed by the JCHR.<sup>815</sup>

Challenges on the strength of the case were made to the executive. Mr Clarke cited the Deputy Assistant Commissioner, Peter Clarke, who had referenced a particular case as an example of terrorists evading justice because of the lack of such provision as 90 day pre-charge detention. In the case of the ‘ricin plot’ of 2002 Mohamed Meguerba, according to Peter Clarke, may have been prevented from absconding from the UK if the 90 day provision existed.<sup>816</sup> Summating his reference to the input from Peter Clarke, the Home Secretary confirmed that the case of Meguerba was ‘a compelling argument that 90 days might have made a difference and allowed things to be dealt with far better’.<sup>817</sup>

In the midst of all debate it was presented that such extensive pre-charge detention would constitute internment similar to that experienced during the troubles in Northern Ireland. Charles Clarke explicitly denied the potential correlation confirming that ‘the measures we are discussing today cannot in any sense be equated with internment. That is simply not the case’.<sup>818</sup> The executive relied on the police and support from independent reviews that moves were acceptable. An obvious weakness in this is the lack of clear evidence documented or verifiable proof to scrutinise thus reducing the opportunity to counter claims against pre-charge detention.

Having undergone a review of the executive’s rationale for 90 day pre-charge detention, examination will now focus on the wider debate on clause 23.

## **6.6 Clause 23 – Overview:**

The right not to be imprisoned without charge and the notion of *habeas corpus* were cited as central to democracy and the rule of law. As such, warnings were presented that

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<sup>813</sup> HC Vol. 438, Col. 340/341, C. Clarke

<sup>814</sup> HC Vol. 438, Col. 926, C. Clarke.

<sup>815</sup> JCHR 3rd report 2005-2006, Summary Pre-charge detention p. 4.

<sup>816</sup> Peter Clarke in demonstrating this case acknowledged ‘Mohamed Meguerba was one of the suspects in that case and it is likely that we would have held him or applied for his detention for sufficient time to find that his fingerprints were on the ricin recipe and he would have stood trial as a main conspirator in that case had he not fled the country’. JCHR 3rd report 2005-2006.

<sup>817</sup> HC Vol. 439, Col. 337, C. Clarke.

<sup>818</sup> HC Vol. 439, Col. 328, C. Clarke.

parliament should be 'hesitant' in locking people up for 90 days.<sup>819</sup> However, challenges to clause 23 focused primarily on the executive justification for extension of provisions.

Such extension to pre-charge detention was identified by a number of MPs and Lords alike as potentially detrimental to the efforts of the anti-terrorism legislation.<sup>820</sup> Increasing pre-charge to 90 days would 'be playing into the hands of the enemy by enabling them to tell one part of our community that it is being victimised',<sup>821</sup> an outcome warned of by the works of Ashworth and the fundamental contradiction thesis.<sup>822</sup> By aiding the recruitment of martyrs, clause 23 may undermine the benefit which the introduction of the legislation intended. Legislation, as a recruitment aid, was identified as comparable with the recruitment of terrorists in Northern Ireland during the Troubles.<sup>823</sup>

The necessity of clause 23 was also questioned. Diluted by claims that 7/7 was not caused by any gaps in terrorist legislation,<sup>824</sup> it was argued that the enhanced safety of constituents would not be guaranteed by 90 day pre-charge detention.<sup>825</sup> Unsatisfied by executive justifications, the constant demand for proof by parliament frustrated the executive's claims of the necessity of clause 23. A lack of succinct and clinical evidence to validate clause 23 facilitated challenges. This was made easier by parliament with the lack of substantive facts, figures and findings to counteract these challenges.

For the executive, whilst it was established that a balance between rights and security was difficult, the extension of pre-charge detention to over 20 times longer than the pre-charge detention for murder, the incompatibilities with Article 5 ECHR and the breach of *habeas corpus* were all outweighed by police requests for 90 day pre-charge detention. These requests were centred substantively on the increase of trans-jurisdictional investigations and the quantity of data requiring analysis. Yet claims of transnational crime and mass data mining failed to hold sufficient resonance with many in the house. This lack of support based on data mining and transnational investigation was ingrained in the comparison made

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<sup>819</sup> HC Vol. 439, Col. 359, D. Winnick.

<sup>820</sup> HC Vol. 438, Col. 928, E. Thornberry; HC Vol. 438, Col. 363, T. Lloyd; HC Vol. 438, Col. 935, K. Clarke.

<sup>821</sup> HL Vol. 676, Col. 1182, Lord Elton; HL Vol. 676, Col. 1175/1176, Lord Condon; HL Vol. 438, Col. 366/367, Douglas Hogg.

<sup>822</sup> Ashworth, A. (2007); Security, Terrorism and the Value of Human Rights.

<sup>823</sup> HL Vol. 675, Col. 1389/1390, Lord Kingsland.

<sup>824</sup> HC Vol. 439, Col. 521, K. Clarke.

<sup>825</sup> HC Vol. 438, Col. 928, E. Thornberry.

with some white collar crime where investigations of this size already operated. These transnational investigations had not required such extensive powers and, therefore, reliance purely on those factors in this legislation failed to necessitate clause 23.<sup>826</sup>

Whilst not central to the debate, risks associated with the quality of evidence obtained from an individual detained for an extended period of time were raised in line with the protections offered under PACE.<sup>827</sup> Under clause 23, with up to 90 day detention and days of questioning, it was considered that risks to the authenticity of confessions may undermine the whole process.<sup>828</sup> This draws potential complications in the process from the rule of law, due process and the protections offered by Article 6 ECHR for fair trial.<sup>829</sup> Responding to these concerns, the Home Secretary maintained that such moves would be adequately protected by the instruments under the rule of law and the ECHR to prevent inadequacies in the process from arising.<sup>830</sup> Whilst this raised concerns over infringements that may be caused, it did not balance in favour of one position over another.

With the acceptance of a 'new threat', inclusion of new complexities, an international framework and new technologies<sup>831</sup> it was advanced by members of the executive that to ignore advice from the police, the primary justification for clause 23, would not only be naïve but would also put the wider public at risk.<sup>832</sup> This raises the question of the rationale for clause 23 amendment at a time when the electorate appeared to support the measure. Why was 90 days detention contested when a number of lives had been lost at the hands of terrorists on July 7<sup>th</sup> 2005 and why did such negativity surround the police requests? One explanation was the requirement for substantive proof from agencies; a requirement warranted following the emerging evidence surrounding Iraq, the WMD fiasco and the Hutton enquiry.

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<sup>826</sup> HC Vol. 438, Col. 377, M. Meacher; HC Vol. 438, Col. 350/351, D. Davis; HC Vol. 438, Col. 359, M. Oaten.

<sup>827</sup> 1984.

<sup>828</sup> HC Vol. 438, Col. 342, D. Hogg; HC Vol. 438, Col. 343, Mr Greive.

<sup>829</sup> HC Vol. 438, Col. 359 Mr Khan.

<sup>830</sup> HC Vol. 438, Col. 343, Mr Clarke.

<sup>831</sup> HC Vol. 439, Col. 527/528, Piara S Khabra.

<sup>832</sup> HC Vol. 439, Col. 367/368, Claire Curtis-Thomas.

### 6.6.1: Police provisions:

The influence of the police over the executive aroused much of the concern regarding clause 23 justifications. Intrinsic themes for the increase of pre-charge detention focused on the threat faced, the time required to fulfil investigative requirements, the nature of internationalism and the necessity for prevention which had forced a different approach in policing. By listening to police advice, critics insisted that a number of damaging features would be created by clause 23. Although the integrity of the police was not called into question, the support which the government had shown to police proposals was based on a two page summary provided by ACPO in July 2005.<sup>833</sup>

Reliance on police assessment was of concern for a number of MPs.<sup>834</sup> Concerns were emphasised in the second chamber that the duty of parliament as the legislature was to ‘temper the demands of various parts of the executive and their agencies’.<sup>835</sup> Whilst the executive should listen to the advice of agencies, they should not accept them blindly. With a key justification of ‘acting on police advice’ the balance had to be made by parliament not the police.<sup>836</sup> Lord Hurd of Westwell indicated:

‘Ministers should not suspend their own powers of judgment, or come to Parliament telling us that it is the view of the police or the agencies so we must accept it. Nor should the police urge Parliament to suspend its views or judgment, but that is what has been happening’.<sup>837</sup>

None of these claims against the position of the police, however, underestimated the difficult task which the police perform. This included the primary task of protecting citizens from crime and terrorism. It was reiterated that the job of parliament was to balance the ‘primary task’ of the police with other considerations including institutional history, liberty, judicial procedure, presumption of innocence and *habeas corpus*.<sup>838</sup> Based on the unsubstantiated evidence to support police claims, of necessity there were concerns that

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<sup>833</sup> HC Vol. 439, Col. 340, J. Denham.

<sup>834</sup> HC Vol. 438, Col 863, J. Denham.

<sup>835</sup> HL Vol. 676, Col. 1195, Lord Henley.

<sup>836</sup> HL Vol. 676, Col. 1195, Lord Henley.

<sup>837</sup> HL Vol. 676, Col 1402, Lord Hurd of Westwell.

<sup>838</sup> HC Vol. 439, Col. 352, D. Davis.

‘work would expand to fill the time allotted’.<sup>839</sup> This concern was intensified when it was perceived that:

‘If one has not found out what one wants from a suspect in 14 days of questioning, I cannot think of a conceivable legitimate reason that, on its own, can be a ground for further detention’.<sup>840</sup>

Comparison was also made with the lack of detention measures across Europe. It was asked why police in the UK needed the extension contained in clause 23 when nations such as Spain, who had experienced similar events to the UK with the Madrid bombings, had not required such extension of powers.<sup>841</sup> As established in the ATCSA 2001, the reply reiterated that comparisons were not possible based on the ‘very different legal systems’ operating across Europe.<sup>842</sup>

Whilst concerns about clause 23 based on police justifications were evident, support for police provisions was also present. This support was grounded primarily on the proximity of the threat demonstrated by the events of 7/7. Support focused on the need for parliament to take advice from ‘experts’. Professional judgements were held to be undertaken in all fields and the professional judgement of the police should be no exception. The situation which the UK was in had no scientific resolve and, therefore, judgements by the police offered a ‘professional best estimate’.<sup>843</sup> Ultimately when the lives of citizens are at stake:

‘Members must think very carefully before rejecting the advice of professionals who have all the facts at their disposal, and who make honest and straightforward recommendations to the Government of the day, using professional knowledge and expertise that we, inevitably, cannot share’.<sup>844</sup>

The fact that police had requested 90 days as a maximum and not as the norm, compounded with provisions of judicial review and a sunset clause it was arguably demonstrated to parliament that the intention of the clause was a genuine commitment to

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<sup>839</sup> HL Vol. 676, Col. 1190, Baroness Kennedy of the Shaws.

<sup>840</sup> HC Vol. 438, Col. 897, D. Grieve.

<sup>841</sup> HC Vol. 439, Col. 341, M. Moon.

<sup>842</sup> HC Vol. 439, Col. 341, C. Clarke.

<sup>843</sup> HL Vol. 675, Col. 1479/1480, Lord Harries of Haringey; HL Vol. 676, Col. 1160/1162, Baroness Ramsay of Cartvale.

<sup>844</sup> HC Vol. 438, Col. 927/928, M. Mates.

go only as far as necessary in response to the threat. In light of the fact that attacks were taking place in the UK it was articulated that:

‘If I am not well, I seek the advice of a doctor. If I have a legal problem, I seek advice from a lawyer. If I have a security problem, I seek advice from the police. That is exactly what our Government have done, and they have acted on it. If we want the police and the security services to protect the citizens of our society, we must heed their advice or suffer the dire consequences that are very likely to follow’.<sup>845</sup>

Even in light of the expertise offered by the police, questions were raised over the calculation of 90 days pre-charge detention and particularly its necessity.<sup>846</sup> The lack of logic in 90 days pre-charge detention was deepened by the lack of evidence to support the current use of 14 day pre-charge detention.

On the wider issue of the success rate of detention Mr Mullins informed that house that of the:

‘895 people arrested under the TA 2000 up to 30th September 2005, only 23 were charged—not convicted, but charged—with any form of terrorist offence. Some 300 others were charged with other offences, some of which were quite minor, and 496 were released without any charge at all. Under the Bill, it would have been possible to hold those 496 people for up to 90 days instead of up to 14 days, as can be done at the moment’.<sup>847</sup>

This point was later resurrected by Mr Greive who again questioned the real value and necessity of such extreme legislative moves.<sup>848</sup> When challenged why no one had yet been detained for 14 days, suggesting the leap from 14 to 90 days to be unsubstantiated,<sup>849</sup> the Home Secretary indicated that the 14 day limit was precisely the reason why the small number of cases referred to in discussion had not exceeded the 14 day detention period.<sup>850</sup>

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<sup>845</sup> HL Vol. 676, Col. 1167, Lord Davies of Coity.

<sup>846</sup> HC Vol. 439, Col. 543/545, M. Creagh.

<sup>847</sup> HC Vol. 438, Col. 380, C. Mullin. A similar point was also presented in HL Vol. 676, Col. 1153, Lord Thomas of Gresford.

<sup>848</sup> HC Vol. 438, Col. 893, D. Greive.

<sup>849</sup> HC Vol. 438, Col. 343, C. Mullin.

<sup>850</sup> HC Vol. 438, Col. 343, C. Clarke.

Relying on statistics to substantiate debate, Mr Khan assessed previous detention records in line with quantifying data recognition and hard drive assessment post release of a suspect. Mr Khan expressed that:

‘Since the change in the law in 2004, there have been 11 instances of detention for 13 to 14 days, and in all of them the detainee has been charged. There have been 12 instances of detention for between seven and 13 days, and in all of them the detainee has been released without charge. In none of those cases has someone been rearrested once the computer has been decrypted or further evidence has been gathered’.<sup>851</sup>

This particular assessment brings into question the actual value of decryption and the necessity of the provision grounded in the time taken for decryption. The indications from this statement by Mr Khan suggest that, whilst decrypting information does take longer, the value may not justify the necessity of cost to rights and liberties. However, the need for intelligence and the time taken to decrypt continued to unfold throughout debate. Whilst some warned of the potential damage caused by not listening to the experts<sup>852</sup> based on a ‘little bit of knowledge about computers or encryption’,<sup>853</sup> others maintained that whilst encryption work was clearly needed, 90 days was not an appropriate period of pre-charge detention.<sup>854</sup>

The Home Secretary explained to the house that the unequivocal advice from the National Technical Assistance Centre was that ‘a 14 or even 28-day period will not allow them the time they need adequately to investigate the most heavily encrypted data’.<sup>855</sup> The pervasive nature of modern encryption and the need for forensic requirements could lead to the hardest cases taking months.<sup>856</sup> Whilst this expert advice demonstrated, at least theoretically, that it could take months for examinations to be completed the necessity of

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<sup>851</sup> HC Vol. 438, Col. 906, S. Khan; HC Vol. 438, Col. 363/364, S. Khan.

<sup>852</sup> ‘Experts’ was the term used within debate however it is not clear who the experts are whether this is the intelligence authorities or a community police officer. There will be a variety of skill sets between these varying degrees of expert and as such, these claims may prove too generic to attract significant interest to.

<sup>853</sup> HC Vol. 438, Col. 927/928, M. Mates.

<sup>854</sup> HL Vol. 676, Col. 1169, Lord Fraser of Carmyllie.

<sup>855</sup> HC Vol. 439, Col. 343, C. Clarke.

<sup>856</sup> HC Vol. 439, Col. 343, C. Clarke.



clause 23 failed to be accommodated. The argument, whilst convincing for extension from 14 days, failed to arouse a totally justifiable timeframe for extension to 90 days.<sup>857</sup>

Professional advice from agencies such as the SIS, GCHQ, the Home Office, the Foreign Office and the police remained pertinent. This network in dealing with terrorism is a resource 'unparalleled' in any other jurisdiction' and, as such, warranted some reliance on their advice. It was presented that simply discussing individuals of real concern requires more than 28 days. The experience of dealing with issues of an international agenda demands a longer pre-charge detention period than 28 days.<sup>858</sup> Although, as seen earlier, the international nature of investigations were similar in time, resources and transnational relationships to that associated with white collar international investigations. With such a framework already operational the claims for detention periods may be redundant.

Another consideration in supporting clause 23 remained the emphasis on the interpretation of 'up to' 90 days pre-charge detention. The 'up to' consideration meant precisely that – simply giving police the buffer zone required if they could justify to a judge the need for the extension.<sup>859</sup> It did not dictate that in all cases suspects would be detained for 90 days. It was also utilised in support of the use of existing legislation and how efficiently measures had been warranted:

'I also draw comfort from the fact that, over the past two years under the current laws, only 11 people have been held for the full allowable period and all 11 were charged. That suggests that the new legislation will be used sparingly and only where the likelihood of charges being brought is high'.<sup>860</sup>

As such, the record of actions under the existing legislation supported the notion that 90 days would be used in accordance with the necessity to do so. This position however failed to prove the necessity of clause 23.

Outlining the timeframe of evidence gathering from 7/7, it was identified that it took over two weeks for the emergency services to gain access to all the sites required just to extract

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<sup>857</sup> HC Vol. 439, Col. 369, Michael Mates; HC Vol. 439, Col. 359, D. Winnick.

<sup>858</sup> HL Vol. 676, Col. 1177/1400, Baroness Symons of Vernham Dean.

<sup>859</sup> HL Vol. 676, Col. 1162, Baroness Park of Monmouth.

<sup>860</sup> HC Vol. 438, Col. 399, S. Malik.

the necessary evidence. This was extended by a further six weeks required to complete the examination of forensics. A total of 42 days was therefore required to complete examination. This, according to Martin Linton, rendered beyond doubt that the current 14 day pre-charge limit would have been inadequate had there been survivors to prosecute.<sup>861</sup> This observation, however, does not coherently justify an increase to 90 days,<sup>862</sup> it simply acknowledges that had there been any survivors (suspected of terrorist links) there would need to have been time to gather evidence before any arrests were made. These observations generated two further challenges. Firstly, that whatever legislation was in place it would not have prevented the events of 7/7,<sup>863</sup> secondly, was a return to the logic behind clause 23. As Mr Heath noted, whilst the extraction of evidence took 42 days, the same argument would have been presented by the police if requesting 120, 365 days or even permanent detention.<sup>864</sup>

When dealing with anti-terrorism legislation, it was acknowledged that both the police and the government may be afforded the benefit of the doubt in decision-making, however, 90 days pre-charge detention was identified as exceptional without substantive proof of necessity. Claims by government that the police needed time to extend inquiries and encrypt footage held limited resonance<sup>865</sup> and, for some encountered the same problems in an increase from 14 to 28 days.<sup>866</sup> It was identified that exactly the same arguments as those presented to the house in 2003 had been presented again but with no added substance.

Against the backdrop of 7/7 it would have proved difficult not to consider the recommendations presented by the police and the government, particularly in light of the Carlile report. Parliament had to establish just how far they would be prepared to go along with extensions in powers of detention, modest or otherwise.<sup>867</sup> The lack of a 'proper police working group, no systematic assessment of their experience and international experience, no discussion of options, and no evaluation of the difference between 30, 60, 90 or

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<sup>861</sup> HC Vol. 438, Col. 908/909/915, M. Linton.

<sup>862</sup> Although it's important to note nor does he claim it to warrant 90 days.

<sup>863</sup> HC Vol. 438, Col. 909, E. Winnick.

<sup>864</sup> HC Vol. 438, Col. 915 E. Heath; HC Vol. 438, Col. 898, J. Gummer.

<sup>865</sup> HC Vol. 438, Col. 898, P. Robinson; HC Vol. 438, Col. 904, J. Bercow; HC Vol. 438, Col. 905, D. Winnick; HC Vol. 438, Col. 912, E. Heath; HC Vol. 438, Col. 381, C. Mullin.

<sup>866</sup> HL Vol. 675, Col. 1406, Lord Lloyd of Berwick; HC Vol. 438, Col. 934/935, K. Clarke; HC Vol. 438, Col. 351/352, C. Mullin.

<sup>867</sup> HC Vol. 438, Col. 383, C. Mullin.

120 days’.<sup>868</sup> This undermined the influence of the police requests for extension of pre-charge detention periods. Indeed, whilst the house accepted the need for longer detention, evidence substantiating 90 days was not forthright requiring revaluation of pre-charge limits.<sup>869</sup>

Challenge towards the need for 90 days pre-charge detention was well established throughout debate, alongside this, the illogical nature of the number of days selected also permeated the amendment requests to extend the period from 14 days to 28.<sup>870</sup> It was presented that, in discarding the police requests for an extension to 90 days based on it being an arbitrary deadline, the same issue of an arbitrary deadline could surely be extended to the members’ arrival and support (for the majority) for the extension of pre-charge detention to 28 days.<sup>871</sup> It was assumed that although the need for an extension had been successfully presented the extension to 90 days was enormously damaging and could wreck lives. Whilst the world had changed since the IRA halted its terror campaign, the inability to calculate the necessity of 90 days left room for possible abuses of power. No justification was ever provided by the police for why they wanted 90 days as opposed to any other period. The government adopted 90 days as their mantra on the back of a press release and the images of two victims of the 7/7 atrocities,<sup>872</sup> neither of which sustained the 90-day thesis.<sup>873</sup> This was furthered by the need for parliament to be seen not to ‘reject police advice’. A lack of ‘concrete reasons’, ‘scientific explanation’ and an apparent plucking of figures from the air, led to a compromise of 28 days pre-charge detention based on the threat.<sup>874</sup> The reality remained that the arrival at the period of 90 day pre-charge detention was not as a result of an ‘exact science’. With advantages and disadvantages to 90 and 28 days respectively, 28 days would be an acceptable compromise to parliament.<sup>875</sup>

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<sup>868</sup> HC Vol. 439, Col. 375/376, J. Denham.

<sup>869</sup> HC Vol. 438, Col. 389, P. Robinson.

<sup>870</sup> Elfyn Llwyd questioned whether extension of pre-charge detention was even required at all, indicating that he would be ‘reasonable and open to argument in deciding whether to agree to some form of abridgement’. This appears the only point throughout the debate where the case for the need for extension was raised at all. HC Vol. 438, Col. 383/384.

<sup>871</sup> HC Vol. 439, Col. 348, I. Lucas.

<sup>872</sup> See The Sun newspaper Tuesday 8<sup>th</sup> November 2005.

<sup>873</sup> HC Vol. 439, Col. 505, D. Grieve.

<sup>874</sup> HC Vol. 438, Col. 934/935, K. Clarke; HC Vol. 438, Col. 351/352, C. Mullin; HC Vol. 439, Col. 503, D. Grieve.

<sup>875</sup> HC Vol. 439, Col. 542, P. Robinson.

Arguments remained fluid over the number of days deemed acceptable for detention without trial to satisfy the needs of the police in dealing with terrorism. Further to this, it was also mooted that other methods could be used instead of relying on such extended pre charge detention. In two separate debates David Davis referred to alternative methods which could be used to reduce the need for such extensive periods of detention. Referencing the five terrorism acts the Labour government had introduced between 1998 and 2005, Mr Davis felt that the number of worthwhile provisions had not prevented the atrocities of 7/7. This alone was proof that the battle against terrorism could not be won with terrorism legislation alone. Mr Davis noted that working in conjunction with anti-terror legislation, the government could do more to secure borders. Immigration and asylum were not isolated topics of discussion from terrorism and throughout the period examined, the government released a number of papers discussing immigration and asylum. However, as 7/7 demonstrated, the threat remained just as prevalent from within. As such, Mr Davis suggested further that the government might fund the security services properly by scrapping ID card plans and facilitating real investigations into suspects. The final suggestion by Mr Davis, in a bid to facilitate anti-terror legislation, was to appoint a minister to deal directly with terrorism. The expertise held by this individual and the ability to coordinate, draw on information and resources, work internationally with developments in legislation and advise committees, parliament and other public authorities would all help, according to Mr Davis, in the fight against terrorism which, as established, legislation alone could not do.<sup>876</sup> Legislation, according to David Davis, however, could be used to help tackle some areas aligned with the prevention of terrorism. As Mr Davis notes:

‘One argument says that it takes time to crack encryption codes to access evidence on computers. That argument is dealt with by invoking the powers in the RIPA 2000, which made withholding such codes a criminal offence’.<sup>877</sup>

These options were similar to those presented by the NGO, Liberty in the JCHR report.<sup>878</sup>

There was no doubt that the extension of pre-charge detention in clause 23 to 90 days aroused concerns over the conflict between extension in powers and Article 5 ECHR.<sup>879</sup> This

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<sup>876</sup> HC Vol. 439, Col. 346, D. Davis.

<sup>877</sup> HC Vol. 438, Col. 351, D. Davis.

<sup>878</sup> JCHR 3<sup>rd</sup> report 2005-2006 28<sup>th</sup> November 2005, Para 83.

potential conflict was clearly raised by the JCHR, however, this was referenced less than anticipated throughout debate. When raised as being on the cusp of acceptability with Article 5 ECHR<sup>880</sup> and with the potential for invoking considerable incompatibilities with PACE rules,<sup>881</sup> it was identified by the executive that such infringements, if indeed they existed, would be entirely a 'matter for the Home Secretary'.<sup>882</sup>

As noted from the outset of this chapter, clause 23 was amended from 90 to 28 days pre-charge detention by its arrival at the second chamber. The proposition for 90 days detention, however, was still considered by the House of Lords. Even though this debate had no influence on the amendment to 28 days, it would be detrimental to later analysis if a brief overview was not provided. With a similar content of debate to that identified in the House of Commons, particular emphasis within the House of Lords addressed: the proximity of threat,<sup>883</sup> public opinion towards 90 day pre-charge detention,<sup>884</sup> the independent report by Lord Carlile of Berriew,<sup>885</sup> the increasing nature of the threat posed by technology<sup>886</sup> and the use of experts in addressing the international nature of the threat faced.<sup>887</sup>

#### **6.6.2: 60 day pre-charge detention: the amendment:**

Even though it has been demonstrated that there were numerous arguments highlighting the advantages and disadvantages of 90 and 28 day pre-charge detention, it cannot be ignored that an isolated debate took place in the House of Lords which considered an amendment from 28 to 60 days pre-charge detention.<sup>888</sup> The amendment presented in the House of Lords was an attempt to deal with doubts within the House who 'genuinely feared

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<sup>879</sup> The potential incompatibility caused by pre-charge detention of 90 days aroused particular debate from W. Cash (HC Vol. 439, Col. 376) who expressed that it was vital that the government must 'dis-apply the Human Rights Act'. As the only member to raise such a measure, this particular discussion has not been noted any further.

<sup>880</sup> HC Vol. 438, Col. 907, G. Prentice.

<sup>881</sup> HC Vol. 438, Col. 353, D. Davis; HC Vol. 438, Col. 352/353, Mr Cash.

<sup>882</sup> HC Vol. 438, Col. 907, D. Winnick.

<sup>883</sup> HL Vol. 676, Col. 1164, Lord Imbert.

<sup>884</sup> HL Vol. 676, Col. 1184, Lord Brooke of Alverthorpe.

<sup>885</sup> HL Vol. 675, Col. 1475, Lord Davies of Coity.

<sup>886</sup> HL Vol. 675, Col. 1408, Baroness Ramsey of Cartvale.

<sup>887</sup> HL Vol. 675, Col. 1475, Lord Davies of Coity; HL Vol. 676, Col. 1171, Lord Stratford; HL Vol. 676, Col. 1174, Lord Merlyn-Rees.

<sup>888</sup> The 60 day pre-charge detention amendment was briefly alluded to in the House of Commons – HC Vol. 439, Col. 376/377, J. Anderson.

that up to 90 days was a step too far’ but who felt 28 days might not be sufficient.<sup>889</sup> Much of the debate referred to was resurrected from the House of Commons with little to add to the ‘mythical’ magic formula for arrival at a pre-charge period of detention.<sup>890</sup> Lord Sewel presented arguments in favour of 60 day detention with conviction. He identified a number of benefits to the increase from 28 days but the decrease from 90 days to a medium of 60 days. For Lord Sewel this potential for 60 day pre-charge detention required at least the opportunity to be tested and, for him, a strong case existed for the extension from 28 to 60 days. The safeguards already inbuilt into the process got the balance right between ‘security and liberty, between collective rights and individual rights’.<sup>891</sup> Although some felt the increase to 60 days was necessary, as the result of decreasing from 90 days, others felt that the increase to 28 days should be tested before considering an increase to 60 days.<sup>892</sup> The moves from 7 to 14 to 28 days were dreadful enough, however, further extensions of executive powers through pre-charge detention were considered by the majority in the House of Lords to be wrong in principle.<sup>893</sup> The final school of thought was those who were in favour not because of their interpretation of the arguments but because of uncertainty whether ‘28, 60 or 90 days offers a complete solution to our problems’, deciding to ‘come down in favour of the middle ground—the 60 days’.<sup>894</sup> This argument is less than fool-proof within the decision-making process, but is possibly reflective of how some members arrived at their interpretation of pre-charge detention.

## 6.7 Concluding remarks:

The events of 7/7, similar to 9/11, provided a visual and emotive backdrop to the introduction of the ATCSB 2005. The speed of the TB 2005 through parliament, unlike either of the acts already examined, provided greater opportunity for parliamentary challenge and scrutiny. Each of these themes explored at the outset of this chapter create a picture in which discussion on the TB 2005 was framed with; the acknowledgement that constriction on liberties would not necessarily enhance security. The events of 7/7 demonstrated that

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<sup>889</sup> HL Vol. 677, Col. 1217, Baroness Ramsey of Cartvale.

<sup>890</sup> Arguments included listening to the advice of Lord Carlile, allowing the police the time they needed to do their jobs properly, increase of technical capabilities of terrorists requires more time (Vol. 677, Col. 1215/1216, Baroness Park of Monmouth).

<sup>891</sup> HL Vol. 677, Col. 1209/1210, Lord Sewel.

<sup>892</sup> HL Vol. 677, Col. 1230, Baroness Kennedy of the Shaws.

<sup>893</sup> HL Vol. 677, Col. 1233, Lord Henley.

<sup>894</sup> HL Vol. 677, Col. 1221, Lord Clinton-Davis.

the UK remained vulnerable to attack, subsequently leading to explicit discussion that in some cases a balance may be required between rights and security. This illustrates that in some cases it is not perceived that individual rights should take priority over collective needs, each of which compounded debate on clause 23.

Early in the gestation of the TB 2005, the JCHR concluded that 90 days would have been disproportionate based on the deficiencies in the procedural safeguards for the detainee, and further, that it could bring about 'independent breaches of Article 3 ECHR'.<sup>895</sup> It was accepted that, whilst the current pre-charge detention period of 14 days needed extending, this had to be proportionate to the threat. The legitimate aim was ultimately for parliament and the courts to decide.<sup>896</sup>

It is possible that 7/7 realigned the balance of security with the interference of rights which could be legitimately restricted in the interests of public safety and national security.<sup>897</sup> As the legitimate aim of the TB 2005 was, according to the JCHR, for 'parliament to ascertain', debate within parliament should have considered the necessity and proportionality of the Bill. As observed by Mr Malik, the question for the house was:

'not whether an increase is needed, but whether 90 days is justifiable. I am not 100 percent convinced, but there is some reassurance(...)'<sup>898</sup>

These reassurances for supporting 90 days lay:

'in the fact that Lord Carlile, the independent reviewer of terrorist legislation, is a strong supporter of the Bill, and that extending the pre-charge period will require judicial review every seven days'.<sup>899</sup>

These 'reassurances', however, did not prove the necessity and proportionality of the TB 2005, rather, they simply identified safeguards; first from the opinion of an independent reviewer on anti-terror legislation itself; and second, on the safeguard of judicial review embedded within the process.

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<sup>895</sup> Para 87, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>896</sup> JCHR 3<sup>rd</sup> report 2005-2006, Summary Pre-charge detention Pp. 4.

<sup>897</sup> Para 7, JCHR 3<sup>rd</sup> Report, 2005-2006.

<sup>898</sup> HC Vol. 438, Col. 399, S. Malik.

<sup>899</sup> HC Vol. 438, Col. 399, S. Malik.

Whilst a number of issues were raised and debated on the need for 90 day detention, the question of how the government came about the increase from 14 – 90 days lay in the requests of the police.<sup>900</sup> In presenting their justifications for supporting the police requests, the executive demonstrated a clear lack of testing applied to ascertain the ‘necessity’ of the extension of pre-charge detention. This lack of interrogation was a clear chink in the armour of the executive’s claims that the moves were necessary and an easy means of challenge to those unconvinced by the extension of power but who may not want to explicitly advocate against the detention period for fear of repercussions on their political status.

Scepticism, however, came not as a result of the infringements of rights which may occur as the result of introducing 90 day pre-charge detention, but that it had not been *proven* that such extension was necessary:

‘The Prime Minister is on the record as saying that the case for the extension to 90 days is "compelling". He clearly believes that there is such a case, just as he believed in those famous weapons of mass destruction. However, the proven case for 90 days, like that for the weapons, simply does not exist’.<sup>901</sup>

Against the backdrop of the Hutton enquiry and the expanding repertoire of intelligence, information and reports to emerge on Iraq and the WMD, the overarching principle remained proving the necessity of measures. This request for proof diametric to the ‘taken on trust’ approach was adopted by the Shadow Home Secretary regarding the measures contained within the ATCSA 2001.<sup>902</sup> It was not sufficient to justify the extension for provisions based on claims over the length of time taken to deal with issues of terrorism overseas based primarily on the lack of sufficiently integrated procedures internationally.<sup>903</sup> This justification however remained flaky and devoid of substance. On this matter, the JCHR received advice from Professor Clive Walker who argued that, while there may have been a quantitative change since October 2003 when the period was last extended to 14 days, placing a greater strain on police resources, there had not been any significant change in qualitative terms: all the reasons now relied on by the police as reasons for the extension

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<sup>900</sup> HC Vol. 438, Col. 897, D. Grieve; Vol. 438, Col. 363, T. Lloyd.

<sup>901</sup> HC Vol. 439, Col. 353, D. Davis.

<sup>902</sup> HC Vol. 375, Col. 40, O. Letwin.

<sup>903</sup> HL Vol. 675, Col. 1400, Baroness Symons of Vernham Dean.



were also relied on in the debate in October 2003 for the extension from 7 to 14 days and therefore ‘a proportionate case is not made out’.<sup>904</sup>

In the on-going search for proof, lack of access to evidence remained a key concern for both parliament and the judiciary. Such limitations support the view that governments often place significant emphasis on the need for extra security but often without providing sufficient evidence.<sup>905</sup> This aside, with greater encroachment on individual rights, Ashworth suggests that ‘there is a heightened need for supporting evidence rather than a mere assertion of worst case scenarios’.<sup>906</sup> As discussed in the introduction, as the exploration of 90 day pre-charge detention increased it became apparent that ‘balance’ was an inadequate means of examining if and how rights are compromised in order to protect security and that the legal requirement of ‘proportionality’ became the bedrock of challenge when demands for proof were requested in order to ascertain necessity.

Confirming the existence of consequentialist opinion within parliament and the focus on the role of the police, it was suggested that:

‘Is it really such a hardship to spend up to—and only up to—three months in custody, protected from abuse by the whole force of the law, if you have given the authorities reason to believe that you are a possible threat, and a great deal of possible supporting evidence exists that must be examined? We must not, in fighting for the rights of the individual prisoner, forget that the police are doing what society requires of them’.<sup>907</sup>

Although society might require the police and other services to protect security, society also require the police to enhance freedom. Such catch-all statements overshadow the notion that there needs to be a balance performed in every decision made and in every individual case. Speaking in such clinical terms deflects from the reality that whether legal or

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<sup>904</sup> JCHR 3<sup>rd</sup> report 2005-2006, Para 84.

<sup>905</sup> This returns to the discussion on balance of the unknowable, proving that a threat exists which is unknown ultimately brings with it a lack of substantive evidence to justify moves. Without evidence this is arguably where debate is forced to either refuse to accept the executive propositions that there is not sufficient evidence to support moves or share, or secondly that there is a requirement to enter into a balance of probabilities; thirdly, is the proposition that balance will be reviewed by the courts to provide another layer of review.

<sup>906</sup> Ashworth, A. (2007); *Security, Terrorism and the Value of Human Rights*. Pp. 209. Also see Waldron, *The Image of Balancing*.

<sup>907</sup> HL Vol. 676, Col. 1163, Baroness Park of Monmouth; HC Vol. 438, Col. 354, P. Murphy.

theoretical in the understanding of rights, decisions are rarely so clear and easy to make. The contested nature of rights - what they are, who they protect, when they are overridden, when they are absolute - all feed into the arrival at a decision where balance or compromise has been considered and hopefully rationalised.

As established, the consensus to emerge from both parliament and the JCHR remained that extension of pre-charge detention powers was not disputed but the length of detention was. Unsophisticated assessments of this moral dilemma emerged within debate:

‘to have one or two people perhaps—perhaps—held in gaol for a few days extra: that loss of liberty. Which is more important? That loss of liberty or the loss of life? I know which side I am on’.<sup>908</sup>

Justifications such as these are particularly unrefined in that there is a failure to review the underpinning principles of what is essential not only legal (satisfying proportionality and necessity), but also moral. If this response was a comparison between the state killing and the state removing liberty then the statement makes sense but if it is between the state removing liberty and the state trying to avert a threat it is different. The threat, risk and infringement are not necessarily proportional and run counter to historic principles of justice.

In situations and times such as this where security demands are high on the populist agenda, human rights must be protected, and indeed why they are legislated for:

‘Suspected terrorists often claim respect for human rights – some of the very same rights they have violated themselves in their acts of focused or indiscriminate victimization. This raises the question of whether terrorists too should be allowed to enjoy human rights. The answer is ‘yes’. People accused of terrorist acts have human rights. That is exactly the difference between a situation of the rule of law and a situation where law is arbitrary. Do they have the same rights as victims? Again, the answer is ‘yes’, although this might go against our own feelings of justice. Everybody is equal before the law’.<sup>909</sup>

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<sup>908</sup> HL Vol. 676, Col. 1191/1192, Lord Foulkes of Cumnock.

<sup>909</sup> Schmid, A. (2005); *Terrorism and Human Rights: A perspective from the United Nations*. Pp. 29.

The comparison between these quotes emphasises the diametric interpretations held within parliament between rights, security and how these can be protected in a climate tainted by catastrophic events such as those presented by ‘New York, Nairobi, Sharm el-Sheikh, Bali—tragically twice—Madrid and even in the period since the introduction of the ATCSA had been attacks in Amman and Karachi’.<sup>910</sup>

Whilst the prospect for 90 day detention fell in the House of Commons, it did not go unnoticed that the moves had been supported by nearly 300 MPs.<sup>911</sup> There was evident concern for the balance of 90 days, however, the role of the parliamentary whip and enforced voting were looming.<sup>912</sup> On reflection of the falling of clause 23, emphasis was laid on the role of the democratically elected house in making such decisions,<sup>913</sup> countered by claims that:

‘Those in another place have changed the Bill in the period of detention permissible. That is of course their right in a democracy, but in a democracy I can also say: I believe that to be a profound misjudgement’.<sup>914</sup>

Confidence was placed in the functions of parliamentarians to ‘debate and to strike a balance between conflicting and competing demands’ – a function which the liberal democrats felt they executed effectively.<sup>915</sup> The amendment to 28 days was seen to remove a major barrier in support of the legislation.<sup>916</sup> There was, however, clear concern from the Home Secretary about the house’s decision to ignore the professional advice of law enforcement and prosecution agencies.<sup>917</sup>

Although this aversion to accepting professional advice received support, the effectiveness of legislation remained an issue of contention, particular whilst support for 90 day pre-charge detention floated around the chamber. David Davis, unconvinced with such extension in the legislation offered:

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<sup>910</sup> HL Vol. 675, Col. 1384, Baroness Scotland of Asthal; HC Vol. 438, Col. 323 C. Clarke.

<sup>911</sup> HL Vol. 676, Col. 1167, Lord Davies of Coity.

<sup>912</sup> HC Vol. 439, Col. 510, B. Etherington; Vol. 439, Col. 516, M. Connarty.

<sup>913</sup> HC Vol. 439, Col. 535, G. Banks.

<sup>914</sup> HL Vol. 675, Col. 1400, Baroness Symons of Vernham Dean.

<sup>915</sup> HC Vol. 439, Col. 364, A. Carmichael.

<sup>916</sup> HC Vol. 439, Col. 511, A. Carmichael.

<sup>917</sup> HC Vol. 439, Col. 492, C. Clarke.

‘to give way now to any hon. Member who can cite a single terrorist incident in this country that would have been averted by the 90-day proposal rather than by good police work or implementation of laws that are already on the statute book’.<sup>918</sup>

This was further maintained with specific reference to the events of 7/7 when it was acknowledged that:

‘It should be borne in mind that not a single life destroyed by the mass murderers on 7 July would have been saved if the clause had been in operation’.<sup>919</sup>

It was clear from the analysis of TB 2005 that, unlike the previous two Bills examined within the thesis, the grounds on which to challenge were available in the public domain. Whilst clause 23 was amended from 90 days to 28 days pre-charge detention, it was never explicitly rejected because of the infringement on rights which such extended period of detention may have, but because of the failure by the government to demonstrate the necessity of moves. The wider political influences of the Iraq war, the Hutton enquiry and previous claims of WMD, all of which had been used in previous debates to orchestrate support, rebounded to undermine the strength of executive claims. This Bill unlike the previous two, was not about to be accepted on ‘trust’ alone. As discussion on 90 day pre-charge detention did not pass between the Commons and the Lords, interaction between the two chambers was not a matter of concern for analysis yet it became apparent from the analysis of the House of Lords that not all members of the chamber were averse to 90 pre-charge detention. What remains from this analysis is that, as with the earlier examinations presented, the ability to ascertain the emergence of discussion on ‘balance’ in the justification of measures is limited to the acknowledgement within the wider debate that ‘balance’ has to be made.

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<sup>918</sup> HC Vol. 439, Col. 353, D. Davis.

<sup>919</sup> HC Vol. 439, Col. 358, D. Winnick.

# Conclusion:

*‘Politics is about the relation between alternative interpretations, and whoever’s interpretation is legitimised enjoys power’<sup>920</sup>*

## Overview of the thesis:

From the outset of this thesis, questions have emerged over the rights and security nexus. Through accepting that balance exists, or at least is required, there comes the assumption that the protection of one right can be better than the protection of another. As identified in Section I, problems in the balance metaphor arise as there is an assumption that collective interests of security can be weighed against individual interests.<sup>921</sup> This interpretation of balance, therefore, implies that a simple objective answer can be made on a calculated basis. This is too simplistic a dichotomy. Rights discourse assumes that there are certain things that should not be permitted as part of general political (state) power, even if they are there to protect the majority and that there are some things (e.g. torture) which should never be permitted. To conceptualise the discourse as a simple matter of balance is to lose some of the nuanced power of rights in protecting individuals from the tyranny of the state and of the majority. A further problem is that known interests are weighed against future uncertainties as prospective risk always threatens to outweigh present interest. Risk, amalgamated with security, rhetoric, and situational framing, supports ‘security’ as a slippery and open textured concept. The result is that it ‘furnishes a justification for widely divergent policies and practices’,<sup>922</sup> acting as a catalyst in allowing the influence of risk and uncertainty to tip the balance.

Through both detailed qualitative textual analysis and quantitative examination of parliamentary debates on UK anti-terrorism legislation during the period of 2001-2006, this thesis has tracked the influence of balance between terrorism, security and rights in official

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<sup>920</sup> Ward, I. (2004); An introduction to critical legal theory; Pp. 148.

<sup>921</sup> This becomes further compromised if the individual also falls within a minority group which may be indiscriminately targeted. As noted in the introduction to this thesis, Liz Fekete has commented on the impact of post 9/11 anti-terror legislation on Muslim communities. As such, members of minority groups arguably face double incursions as both individuals, and further as a member of a minority group. This impact on minority groups whilst discussed in the wider debate, was not an emergent trend to the case studies examined.

<sup>922</sup> Zedner, L. (2005); Securing Liberty in the Face of Terror: Reflections from Criminal Justice. Pp. 516.

political discourse. It has been established that balance not only raises conceptual problems but also procedural problems in who performs balance: parliament or the courts. This procedural issue and the disputes and matters raised by it arise in, though are not fully analysed through, the present study, their full consideration lies out with the present work. Further to this, the quantitative findings demonstrated that balance was documented less frequently than anticipated. The quantitative chapter also presented findings from wider debates containing discussion on terrorism, security and rights. These results exhibited similar data to that found in the case studies.<sup>923</sup>

Following the broader quantitative examination, Section II focused on a single case study from each anti-terror Bill examined. The aim of this was, through a system of coding, to determine the influence of balance. As identified in the introduction, there were two criteria for the selection of a case study. The first criterion was that the case study had to have been raised as a concern by the JCHR; this ensured that the case study legitimately raised human rights concerns. The second criterion was that the justification of security had to be demonstrated by the executive as a justification in warranting measures. As with the quantitative data presented in Chapter Three, the qualitative findings demonstrated that explicit balancing between rights and security was limited. On examination of the debates, the conceptual notion of rights and security, procedural concerns between the legislature, executive and judiciary, the influence of case law, the influence of the HRA directing new constitutional practices and the global concerns over international terrorism, all fed into a complex recipe often resulting in a failure to deliver effective oversight throughout debate.

As a backdrop to the thesis, the introductory chapters considered whether: concepts such as rights and security are either measurable and/or comparable and where the process of balance lies – in parliament or the courts. Following these considerations, the thesis moved to identify the use of ‘balance’ through specific case studies and consider whether balance had been used to legitimise rights or security. By addressing this question, it was hoped that the concepts explored within Chapters One and Two which provided the backdrop to this thesis, would be illuminated through the examination of the central question.

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<sup>923</sup> In most instances, the number of debates engaged in was significantly higher than that found within the case studies.

To explore the central question in this thesis, analysis was performed by examining the political discourse of parliament. The purpose of this analysis was not to assess the legislation and its compatibility with international instruments; Nor to consider the potential repercussions of its enactment. Neither was the purpose of this thesis to provide definitive assessment of the rights and security debate. Rather, the purpose was to examine the processes undertaken in parliament as identified within political discourse so as to determine positions on the anti-terror legislation examined; and examine the richness of the debate concerning human rights and security and how effectively Parliament considers each and balances their competing expectations in its law making.

Chapter One examined the conceptual notions of security, rights and balance establishing that if balance is not grounded in intelligence or evidence established on real threat but on projected numerical assessments of attacks, then rights may be unnecessarily eroded. Chapter Two assessed the relationship between oversight mechanisms and the resulting influence of the HRA on the judiciary. It also reviewed the reports of the recently created JCHR as an additional, though not constitutionally embedded, parliamentary oversight tool. This chapter established that the balance metaphor does not rely on myths or theory but on the need for rigorous scrutiny of the conditions under which security claims warrant the suspension of rights. Therefore, whilst accepting that the executive and legislature can instigate restrictions and legislation during times of national emergency, there is no doubt that if one is to trust in the separation of powers doctrine to provide legitimate legislation, oversight mechanisms must operate in their true role, each arm of power needs to have mechanisms to encourage full and reasoned consideration and ensure the correct procedures are followed, these mechanisms must be robust and fully adhered to. It is imperative that the executive and legislature do not overstep the powers and duties afforded within the separation of powers framework. As a check on their powers, the judiciary may be drawn in at a later stage to examine the legitimacy of actions performed in the creation of legislation potentially identifying infringements, sometimes infringements on the rights of individuals. Failure of the executive and the legislature to operate in their true role risks extensions of powers which can ultimately compromise the authenticity and legality of the legislation created. Although the separation of powers is intended to keep checks and balances, to prevent abuse of power, for it to operate intelligently parliament

should learn from or at least properly deal with not just the decision of the courts, but the reasoning in the case-law leading to actions by the executive and the legislature remaining within the boundaries of their power ideally delivering security whilst also ensuring individual rights. Chapter Three presented the quantitative analysis from the House of Commons from the period of September 2001 – until March 2006, using the control factor ‘rights and security’ as essential in the selection of the measures being examined. This chapter identified the balance of rights and security as being less explicit than anticipated. Chapters Four, Five and Six each addressed one case study from each of the Bills reviewed. Chapter Four reviewed the necessity of derogation as a result of the inclusion of Part 4 within the ATCSA 2001. Chapter Five reviewed the incorporation of control orders and the difference between derogating and non-derogating orders. Chapter Six reviewed the discussion of clause 23, which presented 90 day pre-charge detention, followed by the resulting observation of proposed 60 day pre-charge detention within the House of Lords.

The central aim of this thesis has been to identify the use of ‘balance’ through specific case studies and consider if this is used to legitimise rights or security in establishing support, or used in rejection of draft legislation within UK anti-terror legislation between the periods of 2001-2006. Findings of this thesis identified four overarching themes:<sup>924</sup>

**(1) Parliamentary systems:**

- speed killed debate reducing the opportunity for effective review;
- the lack of structure within parliamentary debate made examination of intricate details and logical and effective debate difficult to achieve;
- anti-terrorism legislation cannot be explored as an isolated issue.

**(2) Issues of contents– the lack of legal challenge:**<sup>925</sup>

- In these debates there was a lack of legal expertise or lack of its use within parliament to argue points of law;
- the findings of the JCHR and other committees especially the Home Affairs Committee, ministerial speeches or any other observations and analysis from the

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<sup>924</sup> It is important to remember that these findings are made based on the evidence presented in this thesis. Particular attention is placed on the case studies.

<sup>925</sup> The findings presented within this theme, leads to or allows, a number of the other issues/problems below to come to the fore.



enormous amount of literature available failed to be fully integrated into the parliamentary review procedure, in many instances these materials were not even mentioned. Further, they were not effectively used to inform important issues of parliamentary debate such as how balance should be assessed.

**(3) The limits of 'balance':**

- difficulty remains over which oversight mechanisms produce balance;
- limited use of balance was demonstrated; the result of focus on the establishment of necessity and proportionality

**(4) Rhetorical misconceptions – the misrepresentation of law and concepts:**

- the belief that collective security is a right which can be orchestrated to outweigh individual rights generating conflicting interpretations of risk and displayed a lack of understanding of rights discourse;
- the use in debate of principles such as liberties rather than rights may have skewed data especially as the differences between these terms were not understood;
- that the initial quantitative coding was performed using strict criteria to code rights and security, however, as the qualitative findings demonstrated, the misconception of rights actually generated debate not based on balancing rights against security within the strict criteria identified in the quantitative findings, but rather, a balance on individual rights against collective rights.

**Parliamentary Systems:**

This examination has identified a number of findings. The first theme assembles findings which collectively considered are seen as fuelling the parliamentary system. The first of these is the speed with which legislation is able to pass through parliament. Both the ATCSA 2001 and the PTA 2005 moved through parliament with great pace.<sup>926</sup> Such speed potentially killed debate<sup>927</sup> thus reducing opportunity for in-depth review of draft legislation

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<sup>926</sup> The speed of the Bills cannot be simply adjudicated on by the duration of the Bill through parliament, but is reduced further to the days and hours spent discussion the legislation. For example, as Simon Hughes noted in relation to amendments suggested to the ATCSA 'One of the terrible consequences of this procedure is that we have an hour in total for this debate'. (HC Vol. 376, Col 923, S. Hughes).

<sup>927</sup> It is not forgotten that parliament has the right to reject legislation irrespective of rationale for doing so, however, rejection based on the speed of the Bill through the house was considered unlikely, particularly in the early stages based on majority party weighting guided by Labour party whips.

supporting the findings of Brazier et al<sup>928</sup> and meaning that the government control of the time to debate legislation (often along with its majority in the commons) ensures it enjoys significant control over the outcome of legislation. As noted in the findings, concerns raised over the speed of Bills accrued a significant percentage of discussion points.<sup>929</sup> By raising these concerns, MPs took up precious time which could have been better spent addressing the quality and implication of the Bill however, such discussion indicated they understood the controlling nature of time constraints and the dangers they posed for good law-making. The quantitative findings support this observation with significant concern raised over the speed with which these Acts passed through parliament. Even though there is no evidence to prove the impact that the speed of the process has had, it cannot be overlooked that the limited timeframe in which to examine, analyse and debate the Bills left legislation vulnerable to ineffective scrutiny within parliament.

Whilst the speed with which the Bills moved through parliament undermined the thorough examination of them, this problem was exacerbated by a lack of structure in debate. Although clauses were considered systematically when voting on the Bill, the lack of structure in the House of Commons in the early review stages hindered effective scrutiny. This was most apparent when coding the first and second readings of Bills. On commenting on the Bill, a number of speakers provided their overarching observations of it rather than drilling down to fundamental concerns. Although the opportunity to address matters existed, debate was too wide ranging to provide effective scrutiny. This format also left speakers vulnerable to distraction of challenges from other MPs, therefore, further reducing the conviction of the speech.<sup>930</sup>

While the sporadic nature of review was less obvious in the House of Lords, the lack of scrutiny appears to be facilitated by a lack of structure in the review process. The paucity of structure within debate also hampered the review of committee and House of Lords amendments within the House of Commons. As the quantitative findings demonstrated, it was at these stages that rights and security discussion appeared at its lowest.

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<sup>928</sup> Brazier, A., Kalitowskil, S., Rosenblatt, G., and Korris, M. (2008); *Law in the Making: Influence and Change in Legislative Process*.

<sup>929</sup> This was specific to the ATCSB 2001 and the PTB 2005 examined.

<sup>930</sup> Intentional or not, throughout MPs interjected with non-related links which then skewed debate slightly as the speaker dealt with the interjection. This in itself ate into the time the speaker was permitted on the House floor.

This issue cannot be completely independent from the speed of Bills through parliament. The lack of coherent debate may further be considered a factor in the lack of clarity emerging from the examination of the rationale, effectiveness, and legality of measures. Whilst throughout debate there is evidence that apprehensions were raised, thorough considerations of these failed to emerge within the case studies examined. The legislative discussion consisted more of disjointed comments than of a proper debate of the important issues. In many cases concerns about human rights or security were mentioned but no debate over these took place. There was never in-depth consideration of any issue which meant that balance was never really considered, merely mentioned by some parliamentarians. Whilst the Lords provided a little more in the way of debate this was only a marginal improvement and even in the Lords there was not clear and full rational consideration of rights, security or how they should be balanced in a free society. This leaves concerns of clarity and legality unchecked beyond their superficial acknowledgment.

Bridging between both the House of Lords and Commons furthered the considerations raised over the contents of debate; this research made clear that anti-terror legislation cannot be explored through a single lens as a standalone issue. As was identified within the quantitative findings,<sup>931</sup> debate outside of anti-terrorism legislation<sup>932</sup> raised similar percentages of rights and security based discussion to that found within anti-terror legislation.<sup>933</sup> These discussions, although not directly attributable to the debate found within the case studies examined, cannot be overlooked as influential on debate whether through assessment or the dissemination of information. With a lack of time available to discuss anti-terror Bills, the opportunity to utilise wider political debate to rationalise anti-terror legislation appears to have been missed. The discussion entitled 'Human Rights' on the 19<sup>th</sup> November 2001 presents a clear example of how discussion on anti-terror legislation found itself being rationalised outside of the debate which was being considered. This overspill of discussion on anti-terrorism legislation into non-legislative debate supports the notion that parliamentary systems interfered with the ability of parliament to scrutinise law effectively. The speed of the process and the structural paucity of debate appears to

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<sup>931</sup> Found in Chapter Three.

<sup>932</sup> Political debate included 'Acts of International Terrorism', 'Middle East Peace Process', 'Northern Ireland', 'Afghanistan War', 'Defence Policy', 'International responses to terrorism', 'Coalition against terrorism', 'Iraq War', 'International Terrorism – generic discussion', and 'other debate'.

<sup>933</sup> See Chapter Three for coding percentages.

have driven debate outside of the legislative parameters and into a wider socio-political debate. These faults become magnified when we look at the scarcity of debate and particularly the lack of legal challenge.

### **Issues of Contents – the lack of legal challenge:**

The problems caused by lack of time, structure and the illogical attempt to isolate issues are exacerbated by the content of the debate. This is in what it omits, but also the inferences made and interpretations presented buttressed by a lack of legal expertise or at least a lack of use of legal expertise within parliament.

From the review of the case studies (above) and the wider statistical review of parliamentary material (in Chapter Three), it was apparent that a lack of, or use of legal expertise within parliament impinged on its ability to scrutinise with the utmost effect. This observation supports the thesis proposed by Tolley<sup>934</sup> that parliament has an insufficient number of legally trained members to promote effective human rights debate. It is argued that this facilitates an unwillingness to engage in deeply entrenched legal debate and therefore, focus is drawn to contestable debate framed within socio-political terms. As noted above, this corresponds with the observation that political debate outside of anti-terrorism legislation was used as a tool to justify, grasp and challenge issues of contention. The lack of legal expertise, or at least the lack of challenge to legal anomalies, was amplified by the lack of structure within debate (see above). Each of these factors enabled challenges to be structured around the individual strengths of the speaker rather than responding to the deep-seated legal problems ingrained within the Bill. The case studies indicated that neither rights nor security were sufficiently discussed through a legal lens.<sup>935</sup>

Law is but one weapon in a massive political arsenal depoliticising political discourse. Discussion throughout the case studies, appeared to centre on often crude value judgements not fully proven nor even explored in a rational discussion.<sup>936</sup> The lack of or use

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<sup>934</sup> Tolley, M. (2009); Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights.

<sup>935</sup> Whilst challenges to the underpinning legalities of the legislation appear marginally greater within the House of Lords than those in the House of Commons, the substantial lack of challenge to legal concerns remained.

<sup>936</sup> This was particularly evident from the supporters of 90 day pre-charge detention found within the TA 2006 discussion.

of legal expertise within parliament may also underpin the limited use of and reference to case law in validating or challenging proposed measures. Even following the decision in *A v Secretary of State (Re A)*,<sup>937</sup> the case studies show that debate within parliament lacked discussion of the case and its judgements.<sup>938</sup> This supports the observation that either the legalities of the case pushed the boundaries of parliament's legal understanding beyond its operable limits, or, reinforces that the boundaries between the legislature and the judiciary should not be blurred and, therefore, should remain autonomous of one another. However interpreted, it was apparent from the examination carried out that court judgements were not utilised to their fullest capacity. Parliament failed to learn from them or to deal with the weaknesses they pinpoint in the law-making processes. Although the separation of powers is intended to keep checks and balances, to prevent abuse of power, for it to operate intelligently parliament should learn from or at least properly deal with not just the decision but the reasoning in the case-law.

Linked to this, and exacerbating the problem, is the issue that not only did parliament fail to learn from external sources such as judgements in cases, but it also failed to utilise the expertise available to it through the rigorous review of the Bills performed by various parliamentary committees especially the JCHR and the Home Affairs Committee. Evidenced within both the quantitative and qualitative findings, the JCHR reports were not used to their optimal capacity; in fact, at important junctures in the debate, they were often ignored and even when mentioned their discussions were not rationally explored. There is a growing field of literature reviewing the JCHR, its history, its functions and its anticipated evolution. The pre-legislative scrutiny process performed by the JCHR is a comparatively recent form of parliamentary scrutiny. As Smookler notes:

'The government decides which Bills should be subject to the process and, whilst they are under no formal obligation to accept any recommendations for amendment, the act of committing a Bill to pre-legislative scrutiny indicates a willingness on their part to improve it'.<sup>939</sup>

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<sup>937</sup> [2004] UKHL 56.

<sup>938</sup> This does not mean that *Re A* was not referenced to but that it lacked in its substantive nature of challenge.

<sup>939</sup> Smookler, J. (2006); *Making a Difference? The Effectiveness of Pre-Legislative Scrutiny*. Pp. 522.

With the government's influence over the process through which the direction of scrutiny is dictated Hiebert<sup>940</sup> identifies several functions for the JCHR to work properly and provide another layer of parliamentary scrutiny to underpin decisions. First, its reports must be perceived as being motivated by principled and not partisan deliberations. Second, it must be able to review Bills and report back to parliament within a time frame that allows parliament to make use of its guidance. Third, it must be generally independent of governmental influence. Fourth, the Committee must command the respect of other parliamentarians and its reports must be taken seriously in parliamentary discussions - a position strengthened by the reputation and credibility of the JCHR legal advisors.<sup>941</sup>

Feldman<sup>942</sup> suggests that the JCHR satisfies functions one and three of Hiebert's requirements; he acknowledges that the JCHR has developed its working methods to ensure that its 'legitimacy and influence' are likely to be maximised by parliament. These methods include the legitimisation of its findings by relying on independent bodies including government departments, and NGOs.<sup>943</sup> The importance lies in the promotion of transparency in processes by publishing and evaluating correspondence with departments; coordination with other committees within parliament to best achieve the right balance yet maintain respect of the separation of powers between parliament and the courts as the committee 'is not an adjudicative body'.<sup>944</sup> As such, the JCHR objective becomes to 'engage' parliamentarians and government in human rights discussions.

The second of Hiebert's requirements seems to have been met in the case studies examined in that the JCHR reported in time for their reports to be used by parliament.<sup>945</sup> The problem is, therefore, that their reports are not sufficiently utilised. These reports are highly respected by others; consequently, the lack of their use by parliament is perplexing and suggests a failure on the part of parliament to perform its function as an effective oversight mechanism. The scarcity of reference to the findings within the JCHR reports, coupled with

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<sup>940</sup> Hiebert, J. (2006); *Parliament and the Human Rights Act: Can the JCHR help Facilitate a Culture of Rights?* Pp. 15-17.

<sup>941</sup> *Ibid.* Pp. 15-17.

<sup>942</sup> Feldman, D. (2004); *The Impact of Human Rights on the UK Legislative Process.* Pp. 113.

<sup>943</sup> This allows specialists, NGOs and 'members of society' a 'systematic channel' for involvement in human rights. See Feldman, D. (2004); *The Impact of Human Rights on the UK Legislative Process.* Pp. 114.

<sup>944</sup> Feldman, D. (2004); *The Impact of Human Rights on the UK Legislative Process.* Pp. 113.

<sup>945</sup> However as the work of Hiebert has demonstrated, it is not always the case that the JCHR has sufficient time for deliberation of draft legislation and as such Hiebert's second requirement is not completely satisfied.

the lack of legal expertise within parliament suggests that resolution of this problem could be fostered through a mandatory review of JCHR reports and findings as part of the legislative scrutiny process performed by parliament.<sup>946</sup> This would both allow for and encourage critical review of the findings thus potentially reducing anomalies in legislation which appear later through the findings of the courts.

With greater emphasis on the work of the JCHR, MPs would be able to utilise the expertise and scrutiny afforded through the JCHR reports on to the Bill under review. The reports used by parliament would 'inform and lend credence to their own means of seeking changes to a Bill'.<sup>947</sup> Whilst the overall effectiveness of the JCHR in its current format has been questioned,<sup>948</sup> more appropriate use of JCHR reports may cause a Bill to be challenged on a greater number of legal issues as a result of the knowledge gained from the reports.

The JCHR however is not a standalone committee in the examination of anti-terrorism legislation. There is an enormous amount of literature which parliament could and should call upon. Digesting and examining these materials will in turn lead to a more intelligent law making process. Official reports from the Home Affairs Committee explicitly addressed the advancement of anti-terror legislation making recommendations based on the quality of the legislation presented, the need for continuous independent review of anti-terror legislation and the limited scrutiny legislation receives as a result of the speed through which legislation can be passed through parliament.<sup>949</sup> Yet even with these explicit observations and recommendations, they remained overlooked and ignored, not even mentioned let alone considered (in its official capacity) from consideration throughout the debates examined.<sup>950</sup> The limited use of such materials further demonstrates the paucity of parliamentary discourse in that broader discussions are not being utilised. Outside of official parliamentary reports, whilst it is noted that references were made to the media and its relationship with the legislation examined, it is argued that the media is used merely as a

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<sup>946</sup> This could also be extended to any committee which reviews legislation such as the Home Affairs Committee which reviewed various aspects of the legislation discussed within this thesis.

<sup>947</sup> Smookler, J. (2006); Making a Difference? The Effectiveness of Pre-Legislative Scrutiny. Pp. 532.

<sup>948</sup> Smookler, J. (2006); Making a Difference? The Effectiveness of Pre-Legislative Scrutiny. Pp. 533.

<sup>949</sup> 19<sup>th</sup> November 2001, The Home Affairs Committee, The Anti-Terrorism Crime and Security Bill 2001. Para 68(b)

<sup>950</sup> Whilst some of the issues identified by the Home Affairs Committee may have been discussed within the examinations, they remain unattributed to the official reports which may have provided depth and substance to observations which may be attributed to a single MP.

backdrop to the debate based on the influence of the populace rather than as the result of any intellectual examination intended to enhance either the legislation itself or the procedural implications. As such, the use of these materials are considered less robust in the quality of their considerations and therefore, when relied upon in contrast to official reports, do not offer the same rigorous examination as that found in academic centric advice and recommendations, the impending result that debate remains ill-informed and shallow in depths of assessment. This reliance on the media suggests that MP's are accurately aware of the influence which decisions made and positions advocated in parliament can have on later hopes of re-election choosing to advocate a position popular with the electorate rather than a more controversial challenge to the legislation.<sup>951</sup>

However this is viewed, the influence of committee reports, and indeed their effectiveness, can only be as good as the use of the information documented. The ability of the JCHR amongst other committees to compile information, particularly in areas where it has been identified that parliament demonstrates weakness, can only be considered as strengthening parliamentary oversight if utilised to its best capacity. By applying information compiled by specialist committees who have been assigned to acquire, analyse and report on the Bill under review, parliament will strengthen its ability to challenge the executive and call it to account but, more importantly, will enhance its ability to pass balanced and fair legislation. The likely consequential effect of this would be to reduce the need for judicial oversight at a later stage by reducing the likelihood of the incompatibility of legislation with Convention rights. Not only will this reassert the historic function of parliament, but further, it legitimises decisions as rigorous scrutiny will be made by elected representatives reflecting the 'will of the people'.

#### **The limits of 'balance':**

Identified from the outset of this thesis questions remained over the performance of oversight in the balance of rights and security. While academics such as De Londras have supported the independence and experience of the courts, the legitimacy of the judiciary as

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<sup>951</sup> It is important to note that this is not a generic observation of all MP's. As the findings documented, there were instances throughout debate where challenges were made especially by the Terrorism Bill 2005.



an oversight mechanism is well documented.<sup>952</sup> It is important not to simply undermine the value of the judiciary in the quest for balance, but to consider its role alongside the continued effective oversight of executive actions. As such, judicial legitimacy may arguably be seen through three principles: the courts as guardians of principle, the courts as tamers of politicians' passions and the courts as arbiters of competence.<sup>953</sup> Each of these principles extends support for the legitimacy of the judiciary as an oversight mechanism. However, although courts claim to objectively apply the law, all cases are necessarily affected by individual judicial discretion and the influence of this should not be forgotten. It is this discretion which has previously demonstrated inconsistencies in interpretation of the law by the judiciary, most notably here, the conflicting judgements made by Lord Hoffman in the cases of *Rehman*<sup>954</sup> and *Re A v Secretary of State*.<sup>955</sup>

To suggest that functions and discourses are competing assumes that somewhere previously criteria have been obtained to achieve legitimate standards. With the need to protect individuals from incursion on individual rights from political power substantiated as the 'will of the people', the legitimacy of standards of interpretation of the law need to be derived from a source other than the opinions of an individual judge, strengthened by the independence of the judiciary from political arms of government. This independence facilitates an unbiased and objective assessment of the legality of acts and decisions of the executive.<sup>956</sup> However, even though judges claim objective application of the law the fact of their differing interpretations and judgements displays that there is some individual impact. For that reason, parliament should open up the issues discussed by the judiciary in order to clarify where the law should be.

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<sup>952</sup> De Londras, F & Davis, F. (2010); *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism*.

<sup>953</sup> For further review see Nicol, D. (2006); *Law and Politics after the Human Rights Act*. Pp. 738/739.

<sup>954</sup> [2001] UKHL 47

<sup>955</sup> Lord Hoffman in the case of *Rehman* [2001]; UKHL 47 at Para 62 noted 'The cost of failure can be high. This seems to me to underline the need for the judicial arm of the government to respect the decisions ministers of the crown on the questions of whether support for terrorist activity in a foreign country constitutes a threat to national security'. Three years later, in *Re A* [2004] UKHL 56, Lord Hoffman returned to the 'ancient values' of liberty, reasserting that it was with the introduction of HRA 1998 that the judiciary could now question the powers of detention. This was not to say that in his previous judgment he did not maintain high regard for the ancient values of liberty, however, the influence of the HRA in guiding scrutiny was now legitimately documented.

<sup>956</sup> Feldman, D. (2005); *Human Rights, Terrorism and Risk: The Roles of Politicians and Judges*. P. 374-75.

The correct allocation of power between judges and politicians is not something which has yet been fully or objectively distilled, maybe this is not possible; rather it depends on one's personal opinion as to the relative merits of elected and judicial institutions.<sup>957</sup> If arguments are powerful enough they can be used to make others believe it is some metaphysical truth – a persuasive 'meta-language' used to convince those unaware of actual meaning.<sup>958</sup> Indeed, as Charles Clarke identified, 'judges assess risk and what is necessary, weighing the public interest on the one hand against the need to protect the liberty of the individual on the other'.<sup>959</sup> This therefore questions the oversight role performed by parliament (as this a role which parliament should be doing but fails to achieve in some circumstances) and further challenges whether it is a role that simply plays lip service to historic principles. This would certainly support the proposition that based on the parliamentary system, challenges to the executive, whilst acknowledged, often achieve very little change. Political challenge as previously established is stifled by the lack of legal knowledge within parliament. This inadvertently draws the judiciary into the process of balance as the oversight of balance based on principles of law are not made within the debate stages. Whether this is an established process is not clear from this research. The very fact that parliament invariably fail to integrate or examine what the judiciary are saying whether to agree or to disagree, suggests that parliament is not using the processes necessary to achieve proper, and legitimate balance. The judiciary have the opportunity to take a more discursive view on the legislation, its weaknesses, its strengths and indeed its legitimacy within the wider European framework. There is no question that with effective review of judgements and judicial discourse, as well as a full and rational consideration of the findings of relevant parliamentary committees parliament could have gained a significant insight into the balance between security and rights (particularly within the scheme of the European framework). This absence of a refined review of judgements and judicial discourse arguably places the parliamentary decision making process into question calling on, in particular, the lack of integrity applied in ascertaining the most informed deliberation of legislation

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<sup>957</sup> Nicol, D. (2006); *Law and Politics after the Human Rights Act*. Pp. 741.

<sup>958</sup> For further examination of this concept of metaphysical language see: Ward, I. (1999); *Law and Literature: Possibilities and Perspectives*.

<sup>959</sup> Vol. 431, Col. 729, C. Clarke.

inclusive of its potential shortfalls.<sup>960</sup> As mentioned above, to prevent abuse of power and for it to operate intelligently, parliament should learn from or at least properly deal with not just the decision but the reasoning in the case-law.

This fundamental problem in balance between process as well as concepts is further strained by the influence of the HRA on the judiciary. The judiciary have now been perceived as a hybrid constitutional model, 'straddling two rival theories: parliamentary sovereignty and judicial supremacy'.<sup>961</sup> In reality and most notably since the enactment of the HRA:

'The courts determine the constitutional standards. Even with a range of wider influence, the courts perform the final analysis in determining whether the particular regime adopted by the legislatures actually satisfy those standards'.<sup>962</sup>

The HRA has forced decisions to be made by the courts which formally would have been made by politicians in that judges can test parliamentary decisions against the standards set in the HRA. Despite the erosion of differences between what judges do and what politicians do, Nicol<sup>963</sup> identifies an important difference between politicians and the judiciary, namely teleology. Whilst politics is a teleological activity, collective teleology is strained among politicians because, as Nicol notes, politicians hold a number of different ideals which are reflected by their different positions in the party spectrum. This could mean that politicians are more interested in promoting the strengths of their own parties' commitment and in denigrating the capacity of other parties than in properly protecting rights.<sup>964</sup> Contrasting this, under the HRA the judiciary appear to have a more united sense of aims with the Law Lords devoting much of their time to enforcing Convention rights and ensuring all legislation is within the vires permitted by the HRA.

If a variety of legitimate justifications can be substantiated, then finding an absolute answer will prove an impossible task. Established earlier, the incorporation of the HRA into the UK

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<sup>960</sup> This lack of integrity is associated with MP's failing to unearth the fundamental principles which should and further must to be raised, examined and applied, inclusive of potential pitfalls to ascertain the most appropriate and legally substantiated legislation possible. Failure to perform these with such knowledge and resources available calls into question the integrity of the legislation from the outset.

<sup>961</sup> Hiebert, J. (2006); Parliament and the Human Rights Act: Can the JCHR help Facilitate a Culture of Rights? Pp. 4.

<sup>962</sup> Tremblay, L. (2005); The Legitimacy of Judicial Review: The limits of Dialogue between Courts and Legislatures. Pp. 648.

<sup>963</sup> Nicol (2006) Law and Politics after the Human Rights Act. Pp. 742.

<sup>964</sup> Evans, C & Evans S. (2006); Evaluating the Human Rights Performance of Legislatures. Pp. 561.

changed the dynamics of judicial strength. Following the decision in *Re A*,<sup>965</sup> comments on the influence of the decision were presented outside of parliament. In a speech in Kuala Lumpur, Cherie Blair praised the decision in *Re A*<sup>966</sup> stating it as a landmark decision which showed the world that governments, even during crisis, must act within the law and voicing that any response that undermined basic values 'cheapens our right to call ourselves a civilized nation'.<sup>967</sup> As Feldman notes, Convention rights form part of the matrix of standards for both the courts and parliament. While courts decide whether legislation is compatible with Convention rights, Parliament must decide its legitimacy. In the end, parliament is supreme but must indicate that it is intentionally interfering with rights – if it does, it should explain why, so reducing the possibility of challenge.<sup>968</sup>

The crux of this thesis lies in the establishment of balance as an influence in the rights security debate within political discourse. It was apparent throughout this examination that explicit discussion of balance between rights and security was limited; rather, critical assessment of the influence of evidence and intelligence in ascertaining necessity and proportionality of measures emerged. If balance cannot be grounded in intelligence, evidence or established on real threat but is rather based on projected numerical assessments of attacks or on unsubstantiated fears, rights will be unnecessarily eroded.<sup>969</sup> Such erosion of rights was demonstrated within all three case studies examined through indefinite detention, control orders and 28 days pre-charge detention.

The focus on establishing the necessity of measures failed to progress examination to balance rights and security to satisfy grounds of proportionality. From the examination of the case studies, it emerged that challenges made to the measures examined were substantiated by the requirement of proof of necessity of moves overshadowing debate on

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<sup>965</sup> [2004] UKHL 56.

<sup>966</sup> *Ibid.*

<sup>967</sup> Michael White, *The Guardian*, Thursday July 28<sup>th</sup> 2005. As noted by Michael White, Mrs Blair (a human rights lawyer) had been invited to speak at the conference on democracy and the protection of human rights in the timely aftermath of the House of Lords judgement in the case of *A v Secretary of State* [2004] UKHL 56.

<sup>968</sup> Feldman, D. (2004); *The Impact of Human Rights on the UK Legislative Process*. Pp. 99.

<sup>969</sup> Zedner, L. (2005); *Securing liberty in the face of terror: reflections from criminal justice*. Pp. 521.

balance.<sup>970</sup> This may have been constricted further by the speed of the Bill through the house facilitating only limited evaluation.

Even with such hazy metaphors as ‘balance’, challenges to the government must be made. It is well evidenced that parliament has a responsibility to challenge the executive. Ignatieff suggests that to prevent executive power from ‘getting out of control’ in the war on terror, the UK had to strengthen the systems of parliamentary review.<sup>971</sup> The ability to review legislative propositions engages a number of areas including social, political and international conditions. Irrespective of the position subscribed to, it must be supported by rigorous analysis of evidence. Securing greater information allows for rigorous parliamentary scrutiny to determine not whether an emergency exists, but whether the scale and nature of the threat is sufficient to warrant such measures.<sup>972</sup>

The request for proof became particularly prominent following the WMD investigation which, consequently, infiltrated debate on the TA 2006. As identified from the case studies, parliament constantly strove for detailed information to be made available, arguing that access to this information could enhance a more meaningful and independent examination. The fact that 90 day detention was reduced to 28 demonstrates that parliament can and does make amendments to legislation. However, what this does not demonstrate is that there was a specific balance undertaken between rights and security to arrive at this reduction. In fact, as noted above, the arrival at a number of 28 was arguably just as arbitrary as the original 90 day provision. Even though it may be contended that the reduction in pre-charge detention from 90 days to 28 demonstrated a small victory for the role of parliament in its function of scrutinising executive actions, likewise, the increase from 14 days to 28 was based on the same evidence as presented for the increase to 90 days. There was no rational justification for the extension of detention to 28 days, just simply the supposition that 28 days was better (or rather that it was less invasive) than 90.

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<sup>970</sup> This focus collaborates with the notion that speed of the bills limited the framework of debate as whilst it was necessary to ascertain the necessity of the proposed legislation, focus on this failed to advance debate on to the wider implications of which the legislation may have. By bringing the balance debate to the floor, examination over the necessity of the bill may have been concurrently advanced. As this was not performed, debate on the balance between rights and security remained omitted from debate.

<sup>971</sup> Seminar with Michael Ignatieff (2004); ‘Political Ethics in an age of terrorism; In Foreign Policy centre.

<sup>972</sup> Dyzenhaus, D. (2007); *Deference, Security and Human Rights*. Pp. 152.

The reduction to 28 days exposed that challenges were made to the executive; however, it fails to detract from the lack of evidence required by parliament to support measures. The executive were not forthcoming in presenting evidence and proof of measures thus orchestrating an acceptance of infringements on individuals, whether proportionate or otherwise, based on 'trusting' the Home Secretary. This was particularly clear in debate on the ATCSA 2001.<sup>973</sup> Such approaches continue to place emphasis on the need for security measures to demonstrate why they are encroaching upon rights. This includes an emphasis on risk assessments of actual risk, residual risk and intelligence based threat assessments, all of which have to be substantiated by evidence and most of all, accountability demonstrated.

Security and rights, therefore, appear to be underpinned by the novelty and intensity of the threat evoking risk assessments, preparation of moves and consultation of effective measures. The second parameter looks at the limits of the proposed exceptional measures within the Bill – its necessity, legality and legitimacy.<sup>974</sup> A lack of explicit use in the balance process clouds the rationale for true arrival at an end position in debate. From the assessments demonstrated in this research it would appear that the 'impossibility of eradicating risk' determines the realistic benchmark in how far measures should be stretched in favour of security or rights, not the explicit balance as previously expressed. It is however essential that to properly alight on the right laws, parliament has first to properly perform, full and in depth analysis of the issues; this was lacking in the debates analysed.

### **Rhetorical misconceptions – the misrepresentation of law and concepts:**

The findings above have addressed considerations such as lack of legal knowledge within debate, considerations of parliamentary systems and the limits of balance both through oversight functions and the conceptual interpretation. A number of these findings feed into the fourth broad theme to emerge which observes the misuse of key concepts.

It was clear from the outset of the quantitative coding process that the interchangeable use of rights and liberties emerged as if they were identical protections. However, as damaging as this was, particularly from a quantitative perspective, the continued proposition of collective security as a right, directed debate between rights and security into a balance

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<sup>973</sup> Refer to Chapter Four discussion to see this position.

<sup>974</sup> Bigo, D and Guild, E. (2007); *The Worst Case Scenario and the Man on the Clapham Omnibus*. Pp. 108.

between individual rights and collective rights. As noted in Chapters One and Two, varying interpretations remain over the understanding of the concepts of rights and security. It was particularly evident from within the House of Commons that an assumption existed that the 'right' of security existed, often demonstrated through a collective security agenda. Whilst security of the individual is explicitly protected through various legal instruments, such as the ECHR, 'collective security' is not a legally protected right. It is, however, an 'interest' which states can use to contain certain rights granting enhanced power to the state.<sup>975</sup> Indeed the perception of collective security reinforces the early subscribed to observation that the lack of legal expertise within parliament hinders thorough debate of the issues.

As examination into parliamentary debate unravelled, it emerged that an amorphous acceptance of collective security as a right existed in seemingly the same, if not superior, status to individual rights; through supporting 'collective rights' via security measures, individual rights' protections may suffer. As identified in Chapter One, the Canadian Attorney General Irwin Cotler<sup>976</sup> and Australian Attorney General Phillip Ruddock<sup>977</sup> both advocate reconceptualising counter-terrorism legislation as 'human security legislation' to reduce the animosity between rights and security. This is directed towards securing the necessary preconditions for the enjoyment of human rights themselves.<sup>978</sup> However, to accept the notion of anti-terror legislation as human security legislation may still facilitate the violation of rights, but through a rhetoric which may offer greater support to security in the underlying balance.<sup>979</sup> As identified from the case studies, the protection of individual rights did not appear as the dominant rationale for challenge or rejection of measures, but the requirement of proof that measures were necessary to protect the public was demanded. Individual rights would, therefore, be curbed if public or 'collective security' could be warranted. Whilst the political discourse established has not been framed within a 'collective security' framework, the analysis would indicate support of Hoffman's analysis that the integration of 'human security' legislation may legitimise the violation of rights, through the rhetoric of greater support to security in the underlying balance.

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<sup>975</sup> E.g. second para of Arts 9-11.

<sup>976</sup> Cotler, I. (2001); *Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy*

<sup>977</sup> Ruddock, P. (2004); *A New Framework – Counter-Terrorism and the Rule of Law*.

<sup>978</sup> For a further examination of this see: Golder, B & Williams, G. (2006); *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism*. Pp. 44.

<sup>979</sup> Hoffman, P. (2004); *Human Rights and Terrorism*. Pp. 949-950.

This notion of collective security is further complicated by the reliance on risk and threat to substantiate provisions in support of security. In viewing risk through this lens, the protection against risk on the grounds of security through collective security (a notion established not to be a legally protected right)<sup>980</sup> increases risk of harm to individual rights. 'Risk' is frequently referenced in the restriction of rights and the extension of security. Therefore, the notion of risk is often used to try to claim that pre-emptive measures are legitimate.<sup>981</sup> Accepting these boundaries it is arguable that, as with many other uncertainties captured within this debate, these influences on justifications of security create a further layer in the balance debate by incubating two competing risks; the risk from an attack competing against the risk to individual rights. Although these risks can be marginalised (with some known influences such as which rights may be infringed), the real assessment remains in 'calculating the incalculable'.<sup>982</sup> As with the examination undertaken to establish whether a balance between rights and security exists, in practical terms, the process of weighing up contributory factors received limited exposure throughout debate. From the analysis this limited exposure to exploring the underlying considerations to warrant such extension of measures was frustrated by the lack of information and evidence presented by the executive. Therefore, against the backdrop of 'collective security' as a notion, the lack or use of legal knowledge within debate within which to challenge, MPs were able to manipulate the concepts to fit their political interests and particularly how decisions would be received by their electorate. This was demonstrated in Chapter Four on the discussion over derogation whereby each of the major parties proposed measures which arrived at the same outcome but via a different method. This arguably supports the notion, that particularly within the House of Commons, the scrutiny of legislation is just as much about politics and voter support as it is about either security or rights. This observation enhances earlier findings that to incorporate the findings of the JCHR (a cross party body with strong independent membership) would legitimise decisions arrived at within parliament on the backdrop of effective scrutiny having been performed to justify the stance presented within the reports.

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<sup>980</sup> That is, that there could be no legal complaint where the state fails to keep people safe and as such it is merely the state taking more powers in order to try to increase security.

<sup>981</sup> This issue is barely addressed within the case studies examine as an issue. This was unexpected as all three case studies involve pre-emptive measures.

<sup>982</sup> Beck, U. (2002); *The Terrorist Threat*. Pp. 41.



Cotler and Ruddock's aspiration of 'human security', combined with the earlier observation by Tosulska<sup>983</sup> that justice is no longer a protected right, penetrates parliamentary debate and fosters the moral aspiration that a right to collective security exists. This leads to the opening of debate and examination of what commonwealth counterparts are observing in the realms of collective security as a protected right. Collective security emerges as the 'theoretical' protection to the legally protected individual right. Collective rights are not enshrined in law but are merely a linguistic tool used to interfere with rights and the protections offered to collective security cannot be substantially legitimised legally, should challenge arise. As such, whilst the notion of security can, where necessary in a democratic state, be used to restrict certain rights such as Articles 8-11 ECHR, the use of collective rights to justify a blanket justification for infringing individual rights, may misguide the direction of debate. This demonstrates yet another example of where the incorporation of the committee reports would guide parliament in their examination of measures, allowing for informed debate and instructing MPs of the awareness of the way in which rights are prioritised and when certain calls in support of security measures may be available.

This lack of clarity over legal principles, the conflation between liberties and rights, and the notion of collective security compromised much of the initial coding process. Whilst throughout the initial quantitative coding there were explicit differences between rights and security, it became apparent as the qualitative investigation evolved, that the misconception of rights what they were, who they extended to and, the framework within which they operate, had in fact generated a debate not based on balancing rights against security, but rather, individual rights (freedom) against collective rights (security and control). This ultimately changes the dimension of discussion within parliament. Infringements on rights appear acceptable, irrespective of their incursions (unless absolutely prohibited such as under Article 3 ECHR), providing that the executive can prove and justify why such measures are necessary. Therefore the 'collective right' to security, whilst arguably rationalised through threat and risk assessments, both attributes of the security framework - remained consequentialist; the 'collective right' of the majority prioritised over the infringement of individual rights. If this line of analysis and law-making continues it is

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<sup>983</sup> Tsoukala, A. (2008); Security, Risk and Human Rights: a Vanishing Relationship.

likely that legislation will be increasingly challenged as laws are being forged using incorrect ideas of legal concepts.

### **Summary of thematic findings:**

Each of the findings presented above feed into the collective overview from the research process undertaken. The broad themes, upon which each of these findings fits, cannot be considered as isolated discussion points. As identified above, a number of findings link between the themes expressed here, identifying a number of weaknesses within the parliamentary system as an oversight and law-making mechanism. This displayed most alarmingly through the lack of legal rigour and rational debate throughout the process. A number of the findings result as the consequence of a further observation to the original examination, as such, the interweaving between the themes make it difficult for findings to be clinical in nature or addressed as standalone issues. The inherent interdependence between a number of the observations and findings within this thesis, indicate that this may be an inherent problem associated with assessing political discourse and more importantly addressing issues of concern.

### **Key limitations of the thesis:**

A number of limitations during the coding process and analysis have impacted on the fluidity of this thesis. Although the sporadic nature of the structure of debate was identified as a finding, this was further compromised by the passing of Bills between the chambers. It was evident from this examination that debate within the House of Lords underpinned a substantial quota of challenges made to the Bills with the House of Lords debate partially compensates for the paucity of debate in Commons where the assessment never really got beyond political rhetoric. Taking only a snap-shot of the debate, therefore, compromises the underlying content analysis hiding the real lack of analysis of the debate within the Commons.

Even with both quantitative and qualitative assessment of parliamentary debate, findings remain limited. This is compounded further by the findings already discussed above. As such, further examination is required to ascertain a better understanding of how anti-terror legislation proceeds through parliament and the tools used to examine the legislation. By

reflecting only a snapshot of the legislation through the lens of a specific case study for each Bill, the depth of detailed consideration of specific issues is strengthened whilst the validity of any summative conclusion is weakened.

A further limitation of this study is the difficulty in the evaluation of rights and security based on the contestability of their composition. As Evans and Evans have identified, the subjectivity of the concepts gives rise to 'pervasive disagreement'. This is particularly so with rights. The evidence in support of rights' theory is soiled with 'the peculiarities of context and the idiosyncrasies of the observer'.<sup>984</sup> Indeed, what one group may regard as a step forward for rights, another may regard as a violation or even an abuse of rights. Ultimately, this contestability means that, in many instances, there is no external standard to which the evaluator can appeal.<sup>985</sup> This subjectivity with parliamentary debate could have been minimised with the incorporation of the JCHR reports. This would have provided a clear platform from which every MP could work from, however, as previously demonstrated, even when there is a helpful context and level of knowledge, it is not utilised. The preference seems to be to use and interpret rights and security to fit their own agendas and not to illuminate or really explain debate diminishing the ability to delineate definitive answers from this assessment leading to debates and legislation based on political rhetoric rather than on ethical and rational considerations

### **Applied Recommendations:**

The findings of this thesis can be used to justify some applied recommendations. First, in instances where concerns over the legality of legislation are raised, legal advice should be sought and externally sourced if required. To retain parliamentary sovereignty this may be achieved through a more stringent application of committee findings into the parliamentary review process. The embedding of committee reports such as those from the JCHR, the Home Affairs Committee, and supplemented with ministerial speeches and other expert examination such as that marginally applied in this process through the work of David Pannick QC prior to debate, may alert MP's to further concerns contained within the legislation beyond that of those raised within the parliamentary discourse alone. By utilising these external materials and calling on such a plethora of expertise, decision-making powers

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<sup>984</sup> Douzinas, C. (2000); *The End of Human Rights*. Pp. 4.

<sup>985</sup> Evans, C and Evans S. (2006); *Evaluating the Human Rights Performance of Legislatures*. Pp. 550/551.

remain within parliament who ultimately assess, amend and vote based on the broadest possible scope of material and the likelihood of or need for judicial intervention/review should thereby be diminished. There is an enormous amount of literature which parliament could and should call upon which will in turn give a more intelligent law making process. Relying on the breadth and depth of literature available, including written resources and oral evidence from expert panels, information can be absorbed by the 'decision makers' and effective and reliably informed challenges to inadequate legislation can be entertained by parliament. Applying this knowledge allows parliament to perform its oversight function in the most effective manner.

A second recommendation is to create a systematic process by which examination of legislation is guided through parliament. This would ensure that debate is clear, focused and available for optimum scrutiny. This would be triggered by the first reading of a Bill. Although a clear structure was evident on the voting procedure for clauses within the Bill, the process of coding demonstrated that there was a cataclysmic approach to raising issues, concerns or support of measures. Debate churned through the speakers in the House, and failed to allow an informed debate, but did enable party political discourse to be espoused. As such, even if issues of significance were raised, interventions often diverted the speaker from developing, expanding and informing the house of the issues being raised. In creating a systematic process by which the examination of legislation is guided through parliament, the reports of committees such as the JCHR and Constitutional Affairs Committee could be utilised to focus debate on the deep rooted concerns with a Bill and create a structure by which issues cannot be overlooked or ignored but are given time for effective scrutiny.

A third recommendation is that, to enhance a wider discussion and thus potentially generate a more sophisticated debate, it may be beneficial to the scrutiny process if Bills requiring derogation from the ECHR to satisfy the conditions contained within it received a minimum number of hours on the house floor to ensure effective scrutiny. By standardising this process in line with the development of a systematic process of debate, not only might debate be enhanced, but further, it reinforces that legislation cannot be squeezed through parliament without sufficient opportunity to examine the potential repercussions of legislation. In providing minimum standards of review, parliament may have enhanced capacity to research and obtain expert advice and guidance to facilitate a critical assessment

in line with the first recommendation outlined above; however this can only be achieved if parliament utilises the materials available to it. Parliament has the opportunity, information unavailable to the wider public and discourse from case law both domestic and European. They also have access to a variety of parliamentary committees yet none of these resources are being used efficiently or effectively within the parliamentary assessment of legislation. By arguing that there should be a requirement to utilise a minimum standard in which parliament should engage these materials a number of conditions will be satisfied including a checking procedure on the powers being used as well as providing a legitimate cross examination of the legislation itself. As discussed on page 250, a significant number of resources are available to provide parliament with a sufficiently educated forum for debate within a broader holistic picture. Although MP's are not expected to be experts on everything, they should be encouraged to seek wider advice from academics, NGOs, and other consultation procedures to enable parliament to construct effective oversight. Once all these resources have been utilised it is imperative that parliament use them. Failing to manage the information with which parliament have now been armed they will remain forever less capable of making intelligent and effective legislation. As the European agenda and wider influences penetrate the UK's constitutional understanding of human rights and their application, access and use of these expert findings and external resources might encourage parliament to embrace rights and consider how best to guarantee their respect whilst still delivering on other requirements such as ensuring the security of citizens. It may further give them a flavour of the current human rights climate which reflects both the needs of the legislation and the individuals affected by the creation of inadequate legislation rather than focusing on the negativities which some people associate with some aspects of human rights application.<sup>986</sup>

Whilst these recommendations do not directly address the issue of 'balance' between rights and security, each recommendation would broaden the scope for discussion to emerge.

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<sup>986</sup> This may prove a particularly useful exercise for MPs such as T. Taylor (HC Vol. 391, Col. 604) who explicitly advocated against the benefits of adhering to the wider human rights framework suggesting that it impinged on the supremacy of domestic legislation.

### Concluding remarks:

Striking the right balance between security and rights is crucial for both the success of anti-terror measures, the maintenance of long held democratic principles and the reaffirmation of confidence that the liberty of individuals will be protected.<sup>987</sup> Post 9/11 debates have emerged publically, politically and legally, all of which have tried to rationalize the boundaries between security and rights.<sup>988</sup> However, arguments appear so interwoven that it is impossible to identify definitive balance. Professor Bobbio explains that:

‘The fundamental problem concerning human rights today is not so much how to justify them, but how to protect them. The problem is not political it’s philosophical’.<sup>989</sup>

This claim by Bobbio, however, may not be correct. Whilst Bobbio might be right in his supposition that the problem may not be political, in law-making it also may not be philosophical. As exposed throughout this analysis, there appears to have been a clear lack in the incorporation of legal instruments, guidance and expertise in establishing the so called balance between rights and security. The UK’s European and International obligations have influence over domestic legislation, and as such, these legal protections cannot be viewed as an attachment to domestic law, but must work in collaboration with one another. By drawing on international reports, examining human rights such as those of the Office to the United Nations High Commissioner for Human Rights, and the JCHR, parliament will be better placed to protect them. If Bobbio’s claim is correct and problems are not political but philosophical, the balance metaphor is unlikely to ever be rationalised within debate as the subjective nature of philosophy will continue to leave the balance of rights in uncertain terms.

Holding both rights and security as equals seems contradictory and untenable; it is difficult to maintain both an ideal of rights relying on internal and external commitments whilst at the same time being fully committed to the ideal of national security. The central aim of this thesis was to identify the use of ‘balance’ and consider its use to legitimise rights or security.

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<sup>987</sup> Von Doussa, J. (2006); *Reconciling Human Rights and Counter-Terrorism – a Crucial Challenge*. Pp. 104.

<sup>988</sup> Commenter’s such as Gearty and Feldman have all raised this debate as part of a wider examination of national security and human rights debate.

<sup>989</sup> Singh, R. (1997); *Of Myth and Reality: The Judges as Guardians of Human Rights*. Pp. 38.

From the examination of both the PTA 2005, and TA 2006, there was evidence that at the very least a limited weighing up or 'balance' between rights and security was required. However, the quantitative findings demonstrated that 'balance' was not significant in legitimising rights or security.

Having established a number of themes within rights and security discussion, the impact of risk, the requirement of proof through intelligence and evidence and the debate surrounding oversight mechanism, the balance metaphor does not rely on myths or theory but on the need for rigorous scrutiny of the conditions under which security claims warrant the suspension of rights.<sup>990</sup> This is a test this thesis demonstrates parliament fails to fulfil; a test performed by the courts. Although it has emerged that courts perform this role, it does not have to be a role performed by the courts. This role could effectively be undertaken by parliament if effective scrutiny was performed before legislation received Royal Assent; If they were to take JCHR and similar debates seriously parliament<sup>991</sup> could successfully conduct this test and open this issue up to wider scrutiny thus reducing the opportunity and need for challenges to be made in the courts. If challenges did then arise in court, the discussion on balance would be likely to be curtailed, and likely to affirm the law made by parliament. This process would reaffirm parliament as an effective oversight tool and place law-making more clearly back with parliament, the courts only occasionally needing to act as a check and balance.

What this research identifies is that the influence of 'balance' does not emerge within political discourse as a justification in the anti-terror legislation examined. The quest for balance raises issues beyond simply rights versus the security debate, including discussion on the parameters between the executive, the legislature and the judiciary. These parameters between the executive, judiciary and parliament are enshrined in the balance debate and grounded in fundamental problems in the initial scrutiny phase by parliament. The executive are not suitably challenged due to a number of reasons including speed,

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<sup>990</sup> Bigo, D and Guild, E. (2007); The worst case scenario and the man on the Clapham Omnibus. Pp. 114.

<sup>991</sup> If then parliament decides to pass legislation inconsistent with rights obligations, as Von Doussa notes, parliament should be required to clearly justify its reasoning for doing so as upholding human rights is vital for an effective counter-terrorism strategy. Von Doussa, J. (2006); Reconciling Human Rights and Counter-Terrorism – a Crucial Challenge. Pp.123.

knowledge and political affiliation.<sup>992</sup> For these reasons, bad legislation is created which eventually becomes challenged in the courts. This returns full circle to earlier observation that if parliament scrutinised effectively and in line with legal understandings, the scrutiny would facilitate rights and security balance within political discourse. What at first was seen to be a balance between rights and security does not emerge as the dominant debate but one constricted by a number of wider issues. Issues include friction between the elected and the unelected, the influence of judicial review and the establishment of necessity without further consideration of their proportionality.

Looking at the opportunity to balance, it is important first of all to consider whether legislative procedures identify proposed legislation that raises potential human rights issues; and secondly, whether parliament triggers discussion to give proportionate attention to human rights' issues.<sup>993</sup> This thesis, therefore, does not look at the output of the legislation which can be influenced by the weighting of parliament but whether expert advice is sought, whether committee reports are introduced to reflect and discuss concerns, whether challenges are made to at least suggest that scrutiny occurs. Without such processes parliament undermines its role as the oversight mechanism and hands primacy intentionally or otherwise, to the judiciary. As has been seen, this is manifested by the incorporation of the HRA into the constitutional framework of the UK.

What this research has demonstrated is that a number of external influences impact on parliamentary debate.<sup>994</sup> As such, the ability to ascertain precise data of how parliament actively legitimises legislation becomes too difficult a task. The findings identified at the start of this chapter also identify that a number of weaknesses exist in the review of legislation performed by parliament. Failure to challenge areas of compatibility, whether to support the need for extension of powers as legitimate, proportionate and necessary, or to demand that such incompatibilities are ratified before legislation is agreed to, demonstrates that parliament may no longer be the democratic voice it once was.

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<sup>992</sup> For further discussion see; Brazier, A., Kalitowskil, S., Rosenblatt, G., and Korris, M. (2008); *Law in the Making: Influence and Change in Legislative Process*.

<sup>993</sup> Evans, C and Evans S. (2006); *Evaluating the Human Rights Performance of Legislatures*. Pp. 551.

<sup>994</sup> See page 243 for review on external influences



It became too easy to accept the introduction of sunset clauses to justify extension of powers. Parliament had access to a number of resources and expert advisors to support in the challenge of executive measures; most notably the findings of the JCHR.<sup>995</sup> The lack of reference to the JCHR and other parliamentary committees in both the quantitative and qualitative findings suggests that the effectiveness and expertise available were either not considered substantive enough to use, or more alarmingly, were unknown to members of parliament or, even more alarming, were not understood and subsequently ignored. If this is so, the increasing influence of the HRA in the UK's constitutional system may suggest a more permanent footing for the JCHR to work within, as identified by the recommendations in this chapter.

Even though commenters suggest that parliamentary challenge is redundant due to the executive's ability to 'flood parliament' for important votes, the reality is that very little challenge to issues of concern was documented. As such, irrespective of potential for flooding the house, even limited challenge remained limp. This undermines the potency of parliament as an effective oversight mechanism with the failure of MP's to provide effective scrutiny. What this lack of challenge also demonstrates is a lack of theoretical underpinning to the foundations of modern politics. There appeared to be little confrontation between MPs from opposite ends of the political spectrum examining issues, challenging one another to justify why their interpretation is superior and best represents the needs of the nation. In various stages of analysis it appeared as if an appeasement had taken place and that compromise without challenge emerged.

As this thesis is designed to examine the influence of 'balance' within parliamentary debate, the presentation of case law, rights and security theory are not designed to provide a deeply entrenched consideration, but provide examples and discussions – a necessary backdrop to the consideration of the strengths and weakness of parliamentary debate. This thesis demonstrates challenges made within parliament but fails to evidence any explicit 'balance'. Challenges that were made were not qualified within a rights or security rationale, the MPs

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<sup>995</sup> It should be noted that access to expert advice was not confined to the JCHR reports. It is arguable that Parliament could have done more in order to achieve the greatest scrutiny such as putting legislation out to consultation or as discussed earlier in this conclusion, contracting out initial reviews of the Bill to academics to hone in on effective consultation procedures. This, however, does not emerge as a procedure undertaken by parliament in their scrutiny of any of the legislation examined in this thesis.

missed these important issues. Before deciding whether the limitations and problems found here are particular to these debates or indicative of a wider lack on the part of parliament, more research would be necessary - this research serves purely as an exploratory investigation. As stated at the outset, it was not the intention of this thesis to provide a definitive answer to the balance dilemma but to investigate whether balance was explicitly used or abused in the creation of this legislation. This thesis has identified a number of gaps and presented clear recommendations laying foundations for future exploratory investigation into rights and security through political discourse.

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- House of Lords; Hansard Volume 631 Monday 28 January 2002 - Friday 1 March 2002.
- House of Lords; Hansard Volume 632 Monday 4 March 2002 - Thursday 21 March 2002.
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- House of Lords; Hansard: Volume 640 Monday 28 October 2002 - Thursday 7 November 2002.
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